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STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION
No. WQCC 14-05(R)

IN THE MATTER OF:
PROPOSED AMENDMENTS TO
STANDARDS FOR INTERSTATE
AND INTRASTATE SURFACE
WATERS, 20.6.4 NMAC

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on the 13th day of October,
2015, this matter came on for hearing before Morris
Chavez, Hearing Officer, and the Water Quality Control
Commission, at the State Capitol Building, Room 307, 490
Old Santa Fe Trail, Santa Fe, New Mexico, at the hour of
1:02 PM.

Volume 1

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	I N D E X	PAGE
1		
2	ART VOLLMER	
3	Public Comment	8
4	Opening Statement by Mr. Verheul	18
5	SHELLY LEMON	
6	Direct Examination by Mr. Verheul	23
7	KRISTINE PINTADO	
8	Direct Examination by Ms. Becker	39
9	JODEY KOUGIOULIS	
10	Direct Examination by Mr. Verheul	53
11	BRYAN DIAL	
12	Direct Examination by Mr. Verheul	63
13	KIRK PATTEN	
14	Direct Examination by Mr. Verheul	71
15	Panel Cross Examination by Ms. McCaleb	73
16	Panel Cross Examination by Commission Members	115
17	Panel Cross Examination by Mr. Schlenker-Goodrich	120
18	Panel Cross Examination by Commission Members	155
19	MARLENE PERROTTE	
20	Public Comment	170
21	JOAN BROWN	
22	Public Comment	172
23		
24		
25		

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1 MR. DOMINGUEZ: Okay. I think if we can all
2 come back together, we will get started again.

3 We will reconvene the October 13th meeting of
4 the Water Quality Control Commission. The time is
5 1:02 PM.

6 We will now move to item number six on the
7 agenda, which is WQCC 14-05(R).

8 I will note for the record that we have --
9 that all the Commissioners that were present this
10 morning are present this afternoon.

11 And with that, I will turn it over to our
12 Hearing Officer for this particular hearing --

13 MR. CHAVEZ: Thank you, Mr. Chairman and
14 Members of the Commission.

15 Good afternoon.

16 My name is Morris Chavez, and I've been
17 designated by the Commission to act as Hearing Officer
18 in this matter, which is being held to conduct the
19 Triennial Review of New Mexico's Water Quality Standards
20 at 20.6.4 NMAC.

21 The review was filed by the New Mexico
22 Environment Department and docketed by the administrator
23 as WQCC 14-05(R).

24 This hearing will be conducted in accordance
25 with New Mexico Water Quality Act and WQCC's Water

1 Quality Regulations and Rule-Making Guidelines.

2 Pursuant to those guidelines, I will conduct
3 the hearing so as to provide a reasonable opportunity
4 for all persons to be heard without making the hearing
5 unreasonably lengthy.

6 All testimony will be taken under oath and all
7 persons giving testimony will be subject to cross-
8 examination by any other person in attendance on the
9 subject matter of their testimony and on matters
10 affecting their credibility. I may limit cross-
11 examination, if necessary, to avoid harassment,
12 intimidation, or repetition of the witness.

13 The hearing is being recorded and transcribed
14 by Kathy Townsend Court Reporters. You may obtain a
15 copy of the transcript directly from the court reporter.
16 It also becomes part of the public record, viewable in
17 the office of Commission administrator.

18 If you have not signed in, please do so at
19 this time.

20 If you have a cell phone, please silence it at
21 this time.

22 Other than the parties presenting technical
23 testimony, I will invite non-technical public comment.
24 If you have not signed in, as I mentioned, please do so
25 now.

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1 Fish is well trained in their use and have had much
2 success safely using these over the years.

3 Evidence presented at previous WQCC hearings
4 and scientific literature support that this use does not
5 prevent a risk to human health or the environment when
6 used according to the procedures.

7 Currently, the current rules require extra
8 hearings by this Commission when we feel that they are
9 somewhat duplicative when used -- when the use is
10 covered by an NPDES permit that has its own public
11 hearing component, NMED and EPA both review, and EPA
12 issues those permits.

13 And so, you know, we feel that this is just
14 duplicative of other review processes. Plus, NEPA is
15 also covered in a lot of uses because these -- a lot of
16 places where these are used are on federal lands, so the
17 NEPA process again has its own public hearing aspect to
18 it.

19 So we -- you know, we concur that extra -- an
20 extra level of hearing by the -- by the Commission would
21 just be a use of extra costs and time-consuming and
22 really slow down the process of helping restore our
23 native fishes.

24 So we just want to say that we believe that --
25 that the proposed rule will allow native trout

1 restoration to be accomplished faster and at a
2 significantly lower cost and still be very protective of
3 human health and the environment.

4 MR. CHAVEZ: Thank you.

5 Is there anyone else who would like to provide
6 public comment at this time?

7 Seeing none, I note that there will be an
8 opportunity at the end of the day to provide public
9 comment and throughout this week.

10 So before we begin, can we have counsel please
11 enter their appearance for the record?

12 MR. VERHEUL: Good morning -- or good
13 afternoon, Mr. Hearing Officer, John Verheul and Kathryn
14 Becker for the New Mexico Environment Department.

15 MS. McCALEB: Jolene McCaleb for San Juan
16 Water Commission.

17 MR. SCHLENKER-GOODRICH: Erik
18 Schlenker-Goodrich, with Western Environmental Law
19 Center. I'm representing Amigos Bravos.

20 MR. ROSE: Louis Rose with Montgomery &
21 Andrews, representing Chevron Mining.

22 MS. KATZ: Lara Katz on behalf of Los Alamos
23 National Laboratory.

24 MR. MOELLENBERG: Dalva Moellenberg of
25 Gallagher & Kennedy on behalf of Freeport-McMoRan.

1 Germaine Chappelle and Konstantin Parkhomenko
2 of our firm may also represent Freeport-McMoRan during
3 parts of these proceedings.

4 MR. CHAVEZ: Thank you very much.

5 So before we begin with NMED, are there any
6 prehearing issues that need to be addressed at this
7 time?

8 MR. VERHEUL: Yes, Mr. Hearing Officer.

9 I'd like to draw your attention to filings
10 last week, the first from Peabody Energy withdrawing
11 both of their positions, and you'll notice that Peabody
12 is not here, so they have effectively withdrawn as a
13 party as a result of the Environment Department coming
14 to resolution with them prior to the triennial review.
15 So that should free up some time.

16 Also, Amigos Bravos jointly filed, along with
17 Los Alamos National Laboratories and the Department, a
18 stipulation agreeing to take one of the issues, the
19 classification of segment 128 on the Los Alamos National
20 Laboratory facility, to pull that out of the triennial
21 review and to come to some agreement on that outside of
22 this process, and Amigos Bravos has also withdrawn their
23 opposition to our piscicide proposal.

24 And that brings us to the matter of the filing
25 which we received today. There was a notice -- a

1 written notice of the withdrawal of Amigos Bravos'
2 position, and in addition to that, a communication with
3 some supplemental testimony and I believe a supplemental
4 exhibit.

5 The Environment Department appreciates the
6 written withdrawal of the opposition to the piscicide
7 proposal, which was an agreement which we believe we had
8 worked out in May; however, we object to the admission
9 of the supplemental testimony, I believe it is, and in
10 particular to the third piece of that, the supplemental
11 exhibit.

12 We're unclear as to why this is being filed as
13 late as it was filed. This is a matter which, as you
14 know, was initiated -- the triennial review, I'm
15 speaking of now, is a matter that was initiated in 2013.
16 And since it's been rescheduled before the Commission
17 multiple times, there have been multiple deadlines and
18 multiple opportunities for filing of notices of intent
19 to present technical testimony, there have been
20 deadlines for rebuttal testimony, supplemental
21 testimony, and we received this communication today, and
22 so we're not in a position to rebut that or really deal
23 with it properly.

24 So on those grounds, we would be opposed to it
25 being admitted to this hearing.

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1 MR. CHAVEZ: Okay. Thank you.

2 The first issue I want to take up is if you
3 refer to the scheduling order for September 28th, 2015,
4 given the fact that some things have changed in terms of
5 parties that will not be participating and agreements
6 have been reached, let me remind all the parties that
7 although we set out, in theory, the manner in which we
8 wanted to conduct this hearing in a timely way, note
9 that once again if Peabody, which we had tentatively
10 scheduled for Wednesday morning, San Juan essentially
11 would be moved up.

12 So what I'm telling you is all the parties to
13 really make sure that you're ready to go at any time,
14 because it might not be as long as a hearing as we once
15 anticipated.

16 So any questions or comments on that?

17 MS. KATZ: Mr. Hearing Officer.

18 MR. CHAVEZ: Yes.

19 MS. KATZ: I just wanted to make clear that
20 the stipulation having been entered on segment 128, the
21 lab is -- effectively that does away with our issues in
22 this triennial.

23 So while we're -- I don't think we're formally
24 withdrawing as a party, we're not going to be -- we
25 won't be offering any testimony or cross-examining on

1 any other issue in this proceeding.

2 MR. CHAVEZ: Thank you.

3 Once again, this hearing is getting quicker by
4 the day.

5 On that note, Amigos -- he's standing up, you
6 knew where I was going. Your expert is still scheduled
7 for Thursday morning?

8 MR. SCHLENKER-GOODRICH: Yes, and he's only
9 going to be available for Thursday.

10 MR. CHAVEZ: Okay. So, Chevron, potentially
11 be prepared to move up in the queue.

12 MR. ROSE: Mr. Chair -- or Mr. Hearing
13 Officer, we are prepared to go forward.

14 We'll get into that when we get to rebuttal as
15 to what the order is going to be and how we're going to
16 deal with that.

17 Our only testimony relates to the aluminum
18 issue that Amigos Bravos' expert will testify about on
19 Thursday. So if it turns out there is a better way to
20 do this, we can talk about it tomorrow, and we can work
21 those details out.

22 MR. CHAVEZ: Okay. Thank you very much.

23 The second preliminary issue that I want to
24 address is Amigos Bravos' notice of withdrawal that you
25 brought up and exhibits.

1 I guess I'm a little concerned with the
2 timeliness of it, given what was the position of NMED.
3 I'm not actually sure if that's even on -- in the record
4 as of yet.

5 Pam, has it been put into the record?

6 MS. CASTANEDA: It was stamped by Linda Vigil
7 this morning from the e-mail, but I just got the
8 originals, so I need to stamp them still.

9 MR. CHAVEZ: So I've got some concern that's
10 not even in the record yet and the timeliness.

11 If I could hear from Amigos Bravos on this
12 issue, given the fact that we've had so much time in
13 preparation for this hearing, why we're getting this at
14 this time.

15 MR. SCHLENKER-GOODRICH: Yes, I apologize for
16 the notice. I mean, it would be our ideal circumstances
17 to have provided that earlier.

18 I would ask for some clarification. There
19 were three exhibits, one of which was a list of muscle
20 species in New Mexico that was identified from Game &
21 Fish information; the second was a guidance document, an
22 EPA guidance document; and then the third was testimony
23 pertaining to aluminum standards in West Virginia.

24 So I would just ask for clarification from the
25 Department which or all -- if it's all of them that he

1 objects to or one in particular.

2 MR. CHAVEZ: Please.

3 MR. VERHEUL: We object to all of these based
4 on timeliness.

5 MR. SCHLENKER-GOODRICH: Well, let me take
6 them in turn, Mr. Hearing Officer.

7 The muscle species, I think that they simply
8 identify species in New Mexico that may be susceptible
9 to aluminum toxicity, so it goes directly to Amigos
10 Bravos' proposed changes regarding the aluminum
11 standards.

12 The second document is an EPA guidance
13 document that was referenced in testimony, it was cited
14 and quoted in testimony submitted by various parties,
15 however, it was not attached as an exhibit, and so we
16 felt that attaching that exhibit, so that the Commission
17 could directly read the information in the guidance
18 document, was appropriate and, in fact, helpful.

19 The third document is an opinion report that
20 was submitted in West Virginia, again regarding the
21 aluminum standards issue, and it goes to whether or not
22 the aluminum standard for New Mexico is, in fact,
23 sufficiently protective of species. So this goes to
24 Amigos Bravos' proposed changes, and so it's an
25 outgrowth of that.

1 It's not critical, frankly, to our case on
2 this, but it does go to testimony that was submitted by
3 one of our experts, Dr. Deke Gundersen, who did
4 reference the West Virginia rule making, and then also
5 rebuttal testimony by Chevron's Dr. Gensemer regarding
6 what occurred in West Virginia.

7 So this was intended to help clarify and
8 illuminate what happened in that rule-making proceeding.

9 MR. CHAVEZ: Okay. If I can go to any other
10 parties on this issue.

11 MR. ROSE: Mr. Hearing Officer, as to the
12 exhibits dealing with aluminum, both the muscle exhibit
13 and the West Virginia exhibit, quite frankly, it's not
14 clear to me how that's going to be offered.

15 It seems to me that it might be better to wait
16 for objections for introduction until -- until Amigos
17 Bravos actually offers it with their witness, because
18 I've got some questions about the exhibits, and we'd
19 like to question their witness as to the exhibits before
20 deciding on whether to object or not.

21 So I think some voir dire with the witness on
22 how those exhibits are going to be offered and what they
23 are offered for makes more sense than trying to resolve
24 it here.

25 MR. CHAVEZ: Thank you.

1 Any other parties on this issue?

2 Yes.

3 MR. MOELLENBERG: Mr. Hearing Officer, we
4 would join in the objection.

5 I would also agree with Mr. Rose's comments,
6 that perhaps it's better to wait for the context and the
7 time in which there is a motion to actually admit these
8 or address testimony to them.

9 MR. CHAVEZ: Thank you.

10 I think I've decided that I am going to wait
11 until these have been offered and there is some
12 opposition to make a decision on those issues.

13 Any other prehearing issues?

14 All right. Seeing none, I'd like to call the
15 petitioner.

16 MR. VERHEUL: Thank you, Mr. Hearing Officer.

17 Would you like me to bring my witnesses up now
18 or give opening statement first and then bring my
19 witnesses up?

20 MR. CHAVEZ: Go ahead and bring them up now,
21 so you can go right into -- after we swear them in, you
22 can go right into your questioning.

23 MR. VERHEUL: Thank you.

24 Good afternoon. Mr. Chair, Members of the
25 Commission, Mr. Hearing Officer.

1 The purpose of today's hearing is to conduct
2 what's commonly called the Triennial Review of the State
3 of New Mexico's Water Quality Standards for Interstate
4 and Intrastate Surface Waters, which I will refer to as
5 the water quality standards.

6 New Mexico's water quality standards are
7 codified as Title 20, Chapter 6, Part 4, of the New
8 Mexico Administrative Code.

9 This hearing is mandated under the state and
10 federal regulations by Section 303(c)(1) of the federal
11 Clean Water Act, which requires each state to hold a
12 public hearing, known as a triennial review, at least
13 once every three years to review, and if appropriate,
14 modify its water quality standards.

15 Under the state Water Quality Act, the Water
16 Quality Control Commission, this Commission, is the
17 state water pollution control agency for all purposes of
18 the federal Clean Water Act and is responsible for
19 adopting and revising water quality standards.

20 The Commission must hold a public hearing in
21 order to adopt or amend standards.

22 The Commission shall adopt water quality
23 standards for surface and groundwaters of the state
24 based on credible scientific data and other evidence
25 appropriate under the Water Quality Act.

1 The standards shall, at a minimum, protect the
2 public health or welfare, enhance the quality of water
3 and serve the purposes of the Act.

4 In making standards, the Commission shall give
5 weight it deems appropriate to all facts and
6 circumstances, including the use and value of the water
7 for water supplies, propagation of fish and wildlife,
8 recreational purposes, and agricultural, industrial, and
9 other purposes.

10 At the conclusion of this hearing and after
11 the Commission approves and adopts its final decision
12 into state law, any revisions to the standards are
13 required, under Section 303(c)(3) of the federal Clean
14 Water Act, to be sent to the Environmental Protection
15 Agency for review and approval.

16 While we fully expect the EPA to approve all
17 of the Bureau's proposed changes, if EPA does not
18 approve the water quality standards, it first gives the
19 state an opportunity to correct any issues it has. If
20 the state cannot or will not correct the issue, then EPA
21 must promulgate water quality standards on behalf of the
22 state.

23 In the past, there have been instances where
24 the EPA has disapproved a portion of New Mexico's
25 proposed water quality standards, but in each case this

1 Commission has adopted revisions in subsequent hearings
2 which have addressed the issue.

3 Today, the New Mexico Environment Department
4 is presenting proposed amendments to the state standards
5 for interstate and intrastate surface waters based on
6 the triennial review initiated in 2013.

7 First, Acting Surface Water Quality Bureau
8 Chief Shelly Lemon will address key issues related to
9 designated uses. Next, Kristine Pintado, the Bureau's
10 water quality standards coordinator, will present
11 testimony in support of the temporary standards and
12 piscicide provision proposals, application of the
13 hydrology protocol to five ephemeral drainages at Chino
14 Mines, and other minor changes in particular sections
15 and to certain segments.

16 Jodey Kougioulis and Bryan Dail, environmental
17 scientists with the Bureau, will present the Bureau's
18 application of the hydrology protocol, aquatic life use
19 attainability analyses, and changes to certain segments.
20 All of our witnesses will stand for cross-examination as
21 a panel.

22 In addition, Kirk Patten from the New Mexico
23 Department of Game & Fish will testify and sit for
24 cross-examination in support of our piscicide proposal.

25 The Department has four key objectives for

1 this triennial review, which are first to resolve
2 outstanding issues from the last triennial review;
3 second, to provide updates to reflect new information
4 and new technical capabilities; third, to address
5 segment-specific issues; fourth, to render the standards
6 more clear, informative and accessible.

7 To accomplish these objectives, the
8 Department's petition proposes new procedures to adopt
9 temporary water quality standards, an update for
10 piscicide applications, upgrades to recreation uses for
11 certain streams, reclassification of several ephemeral
12 streams using procedures adopted in the last triennial
13 review; adding language to address EPA's use of the
14 hardness-based criteria for aluminum, and adding refined
15 aquatic life uses for streams in the San Juan River and
16 in the Mimbres closed basin.

17 May I proceed with calling the Department's
18 first witness?

19 MR. CHAVEZ: Please proceed.

20 MR. VERHEUL: The Department calls Acting
21 Surface Water Quality Bureau Chief Shelly Lemon.

22 (Oath administered to Shelly Lemon, Kristine
23 Pintado, Jodey Kougioulis, Bryan Dail and
24 Kirk Patten.)
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SHELLY LEMON

after having been first duly sworn or affirmed,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VERHEUL:

Q. Please state your name and your current
position.

A. My name is Shelly Lemon, and I'm currently the
acting Bureau chief of the New Mexico Environment
Department's Surface Water Quality Bureau for about a
week now.

Q. And why is it that you are the acting Bureau
chief?

A. Dr. James Hogan is on a medical leave.

Q. Please summarize your education and your
relevant experience.

A. I hold a bachelor's of science degree and a
master -- in biology and a master of science degree in
hydrology from the University of Arizona.

Before joining the Department, I was a
research assistant for the Center for Sustainability of
Semi Arid Hydrology in Riparian Areas, a National
Science Foundation Science and Technology Center at the
University of Arizona, and also a high school science
teacher in Arizona.

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1 I've been with the Surface Water Quality
2 Bureau since August of 2004.

3 Q. And what positions have you held in the Bureau
4 for the past 11 years?

5 A. When I first joined the Bureau, I was a total
6 maximum daily load scientist, and within a year, I
7 assumed more responsibility as the nutrient and lakes
8 team leader.

9 In these capacities, I prepared watershed
10 planning documents, known as TMDLs, to improve water
11 quality; conducted public meetings to address -- to
12 address stakeholder comments and concerns; and oversaw
13 the Nutrient Criteria Development Program for New
14 Mexico's surface waters.

15 I was then promoted to become the monitoring
16 team leader for the Monitoring, Assessment and Standards
17 Section, which included planning and conducting water
18 quality surveys throughout New Mexico; reviewing and
19 integrating assessed data for use in Clean Water Act
20 activities; and developing protocols to standardize
21 tasks.

22 During this time, I also served as the acting
23 program manager for the Monitoring, Assessment and
24 Standards Section for one year when Dr. Hogan became the
25 acting Bureau chief in 2012.

1 After a brief period as a middle school
2 science teacher, I returned to the Bureau, serving as a
3 municipal team leader for the Point Source Regulation
4 Section and conducted compliance evaluation inspections
5 for federally permitted facilities, worked with EPA and
6 permittees to draft appropriate and protective point
7 source discharge permits in New Mexico, and reviewed and
8 certified federally issued National Pollutant Discharge
9 Elimination System permits through Section 401 of the
10 Clean Water Act.

11 Since July, I've served as the program manager
12 for the Monitoring, Assessment and Standards Section and
13 I'm currently the acting Bureau chief for the Bureau.

14 Q. And, Ms. Lemon, was your resume prefiled?

15 A. Yes.

16 My resume is prefiled as Exhibit 66.

17 Q. And did you prepare any technical testimony
18 for this triennial review?

19 A. No.

20 As the acting Bureau chief, I am adopting the
21 written technical testimony of Dr. James Hogan that was
22 previously filed as part of the Bureau's notice of
23 intent as Exhibit 1.

24 Q. And have you familiarized yourself with
25 Dr. Hogan's prefiled direct testimony?

1 A. Yes.

2 Q. Do you have any changes to that direct
3 technical testimony today?

4 A. No.

5 Q. Do you adopt Dr. Hogan's testimony today as
6 your own correct testimony?

7 A. Yes.

8 Q. By way of introduction, would you please give
9 an overview of that testimony?

10 A. Because it is essential to the triennial
11 review process, I will provide an overview of water
12 quality standards and explain how they relate to
13 designated uses and criteria.

14 I will then address key issues related to
15 establishing or changing the designated uses that apply
16 to a water body, as well as discuss the Department's
17 proposal to change the recreational contact use of nine
18 water quality segments.

19 Finally, I will describe the steps we took to
20 comply with the regulations for this rule making and
21 summarize how the Department involved the public in the
22 development of the proposals presented today.

23 Q. And what are the objectives of the water
24 quality standards in New Mexico?

25 A. The New Mexico Water Quality Act states that

1 water quality standards shall, at a minimum, protect the
2 public health or welfare, enhance the quality of water,
3 and serve the purposes of the Water Quality Act.

4 New Mexico water quality standards must be at
5 least as effective as the federal water quality
6 standards regulations, which provide that states adopt
7 water quality standards to protect public health or
8 welfare, enhance the quality of water, and serve the
9 purposes of the Clean Water Act.

10 EPA has long interpreted the purpose of the
11 Clean Water Act as attaining water quality which
12 provides for the protection and propagation of fish,
13 shellfish and wildlife, and provides for recreation in
14 and on the water, what are commonly known as the Section
15 101(a)(2) fishable/swimmable goals.

16 Q. What role did designated uses play in the
17 water quality standards of New Mexico?

18 A. New Mexico's water quality standards define
19 water quality goals by designated uses -- designating
20 uses for rivers, streams, lakes, and other surface
21 waters; setting criteria to protect those uses; and
22 establishing provisions to preserve water quality.

23 The water quality standards are organized into
24 water quality standard segments to categorize or group
25 surface waters of the state.

1 As defined in the standards, the waters within
2 a segment should have the same uses, because they
3 exhibit similar physical, chemical and biological
4 characteristics and flow regimes and similar reactions
5 to external stresses, such as the discharge of
6 pollutants.

7 The state's designated uses define how a water
8 in a segment is used. The designated use then serves as
9 the basis for setting specific water quality criteria
10 necessary to protect public health and the environment
11 related to that use.

12 Designated uses include primary contact
13 recreation and subcategories of aquatic life uses, other
14 than limited aquatic life, related to fishable/
15 swimmable goals.

16 In addition, states may adopt or designate
17 other uses based on their importance to the state. Some
18 of the other uses in New Mexico are public water supply,
19 wildlife habitat, livestock watering, and irrigation.

20 Q. What uses are required to be protected?

21 A. Federal regulations require that a water body
22 be protected for all existing uses, which is defined as
23 those uses actually achieved in the water body on or
24 after the Clean Water Act was passed.

25 Federal regulations also require protection

1 for attainable uses, where an attainable use is one that
2 is feasible to achieve through practicable measures.

3 The New Mexico water quality standards require
4 that existing uses shall not be removed whether they
5 have been designated in the water quality standards or
6 not unless they are replaced by a more stringent use.

7 Q. What are water quality criteria and how do
8 they relate to designated uses and the water quality
9 standards?

10 A. Water quality criteria are the specific
11 limitations that we set in order to ensure water quality
12 necessary to protect a designated use.

13 The water quality standards include both
14 narrative and numeric criteria.

15 The narrative criteria are general and apply
16 to all uses unless specifically exempted, and they serve
17 to ensure that general surface water quality will not
18 injure human health or aquatic life.

19 There are no numbers in narrative criteria to
20 serve as hard targets. For example, the narrative
21 criterion for pathogen reads "Surface waters of the
22 state shall be free of pathogens from other than natural
23 causes in sufficient quantity to impair public health or
24 the designated existing or attainable uses of a surface
25 water of the state."

1 Numeric criteria, on the other hand, are
2 specific to particular designated uses and have hard
3 numbers as goals. For example, the warm-water aquatic
4 life use has a maximum temperature criterion of 32.2
5 degrees Celsius or 80 degrees Fahrenheit.

6 Q. How do the fishable/swimmable goals of the
7 Clean Water Act that you previously identified relate to
8 designated uses?

9 A. EPA views the federal regulations to establish
10 what is commonly known as the rebuttable presumption
11 that the fishable/swimmable uses are attainable in all
12 waters unless a use attainability analysis, which I will
13 refer to as a UAA, demonstrates otherwise.

14 Specifically, the federal regulations, under
15 40 CFR 131.2, require states to adopt standards that
16 serve the purposes of the Clean Water Act, and where
17 attainable, these standards must support the
18 fishable/swimmable goals.

19 In New Mexico, fishable/swimmable uses are the
20 aquatic life uses other than limited aquatic life and
21 the primary contact recreation use.

22 The federal regulations, at 40 CFR 131.10(j),
23 further require that before adopting a designated use
24 that does not support the fishable/swimmable goals, a
25 UAA must be completed to demonstrate that these uses are

1 not existing nor attainable.

2 Q. And what is a use attainability analysis or a
3 UAA?

4 A. A UAA is a scientific study conducted for the
5 purpose of assessing the factors affecting the
6 attainment of a use, as described in Section 15 of New
7 Mexico's water quality standards.

8 An example of where the Bureau is conducting a
9 UAA to change the aquatic life uses will be provided in
10 Dr. Dail's testimony.

11 Q. How does the rebuttable presumption relate to
12 designated uses in New Mexico?

13 A. During the 2005 triennial review, this
14 Commission adopted limited aquatic life and secondary
15 contact as default uses for ephemeral waters.

16 EPA, in the record of decision, did not
17 approve these standards because they determined they
18 were not consistent with Clean Water Act Section
19 101(a)(2) goals because they do not support
20 fishable/swimmable uses.

21 While EPA supported the concept of these uses,
22 they emphasized EPA's current water quality regulation
23 effectively establishes a rebuttable presumption that
24 fishable/swimmable uses are attainable unless it can be
25 demonstrated that such uses are not attainable.

1 In short, to seek the removal of any
2 fishable/swimmable designated use a petition to the
3 Commission must demonstrate, through a UAA, that the
4 fishable/swimmable uses are not attainable and less
5 stringent designated uses are scientifically supported.

6 Q. How did this Commission address EPA's record
7 of decision?

8 A. This Commission adopted a set of revisions in
9 the 2009 triennial review to address the issue raised in
10 EPA's 2005 record of decision.

11 The adopted 2009 revisions clarified that UAAs
12 were needed to assign secondary contact and limited
13 aquatic life uses to ephemeral streams and developed a
14 specific process known as the hydrology protocol for
15 conducting these UAAs.

16 An example of this process will be provided
17 shortly in the testimony of Mr. Kougioulis.

18 Q. Has the Commission approved a use
19 attainability analysis?

20 A. Yes, they have.

21 As more waters are assessed in greater detail
22 and data monitoring is compiled over time, the
23 Commission has recognized a number of waters in which
24 the current designated uses were not attainable and a
25 UAA was approved to assign appropriately protective

1 standards.

2 Q. What are the requirements for streams once a
3 UAA is conducted and less than fishable/swimmable uses
4 are adopted for that water body?

5 A. Both the state water quality standards and the
6 federal water quality regulations require a review of
7 all waters that do not meet the fishable/swimmable uses
8 to determine if new information indicates a higher use
9 is attainable and revision of the water quality
10 standards is necessary.

11 This review is expected to occur at least
12 during the following triennial review.

13 Q. Why is this requirement important at this time
14 in this triennial review?

15 A. As described in the direct written testimony
16 of Ms. Pintado, during this triennial review we
17 identified nine water quality standard segments
18 designated with secondary contact uses and criteria.

19 The state is required to review these waters
20 to determine if new information indicates the goal
21 remains unattainable.

22 The Bureau could find no UAAs that support the
23 secondary contact uses and criteria in these nine
24 segments.

25 Q. Does that mean that in these nine segments the

1 Department is proposing to upgrade the use from
2 secondary contact recreation to primary contact
3 recreation?

4 A. That's correct.

5 Q. What evidence supports primary contact
6 recreation use as an existing or attainable use in these
7 nine water quality segments?

8 A. There is evidence of water-based recreation
9 occurring in each of the nine segments. To collect this
10 information, the Bureau viewed surface water quality
11 monitoring data and records and conducted website
12 reviews. We also reviewed field observations from
13 Bureau monitoring staff and the New Mexico Department of
14 Game & Fish.

15 Our review documented direct evidence, such as
16 soaking, swimming, or scuba diving, that primary contact
17 recreation is an existing use.

18 Elsewhere, there was a significant amount of
19 other water-based recreation occurring, such as boating
20 and fishing.

21 Based on the Bureau's experience, where
22 boating occurs, primary contact recreation is almost
23 always an existing use and is almost certainly an
24 attainable use.

25 Based on all of this evidence, the Department

1 proposes that the Commission should adopt designated use
2 changes, as appropriate, based on the recreational
3 activities occurring or attainable in these segments.

4 Q. Did the Department conduct outreach related to
5 this specific proposal?

6 A. Yes, we did.

7 The Bureau's Point Source Regulation staff
8 reached out to the operators of four treatment plants
9 that discharge to waters included in this proposal.

10 As such, these plants could be assigned limits
11 based on more stringent bacteria criteria, based on the
12 proposed designated use upgrades to primary contact.

13 The Bureau's Point Source staff contacted each
14 operator to make them aware of the proposed changes and
15 how these changes may affect their EPA-issued National
16 Pollutant Discharge Elimination System permits.

17 Bureau staff were also available to meet and
18 assess options allowed through one or more of the
19 permitting tools in the water quality standards and
20 permit implementation policies.

21 Q. Let's turn to the outreach that the Department
22 conducted to comply with the requirements for public
23 participation in this triennial review.

24 What did that consist of?

25 A. The Bureau conducted extensive prehearing

1 outreach in developing its proposals, as the scoping
2 phase and the intent to prepare the triennial review was
3 announced in public notices on April 3rd, 2013, and
4 invited the public input for 30 days to identify issues
5 of concern and to propose revisions for consideration in
6 the standards.

7 On April 1st, 2014, the Bureau published a
8 public discussion draft of proposed amendments and
9 invited public comment for a period of 60 days, ending
10 on May 30th, 2014.

11 The Bureau published the public draft
12 proposals in the New Mexico Register, newspaper legal
13 ads, e-mail notices, public releases, and the Bureau's
14 website.

15 Throughout the triennial review process,
16 Bureau staff met with everyone who made a request.

17 Additional public participation specific for
18 the UAA proposals will also be presented in testimony on
19 these proposed amendments.

20 The Bureau petitioned the Commission during
21 its July 8th, 2014, regular public meeting to conduct
22 the triennial review hearing. Along with the petition,
23 the Bureau presented its proposed amendments and
24 narrative explanation, proposed scheduling order, and
25 request for a hearing.

1 Legal notice for the hearing and subsequent
2 changes to the hearing date was published in the New
3 Mexico Register, in both Spanish and English, and in
4 three newspapers of general circulation around the
5 state: the Albuquerque Journal, the Santa Fe New
6 Mexican and the Las Cruces Sun.

7 Notice of the hearing was sent to the
8 Commission's mailing list, the Bureau's mailing list,
9 and published on the Bureau's website.

10 Q. Did the Department receive any comments on the
11 proposed amendments?

12 A. Yes.

13 The Bureau received comments during both
14 public review periods from the EPA, watershed river
15 conservation groups, municipalities, water districts,
16 industrial and trade groups, private entities and
17 citizens.

18 Comments received and the Bureau's responses
19 are publicly available on our website and in the record
20 as Bureau's Exhibits 8 and 9.

21 Q. Did the Department change proposed amendments
22 based on public comment?

23 A. Yes. We made changes to the proposals based
24 on public input.

25 The most significant changes are to the

1 temporary standards and piscicide proposals. Details
2 about these changes will be described by Ms. Pintado in
3 her testimony.

4 Q. And did the Department prepare a document that
5 shows all of the changes to date, including those made
6 in response to more recent input?

7 A. Yes.

8 The Bureau has prepared the Department's
9 second revised petition and filed it on September 4th,
10 2015. This consolidates all changes made since the
11 original and amended petitions.

12 Q. Is the September 4th filing the Department's
13 current and comprehensive petition for the Commission's
14 approval?

15 A. Yes, it is.

16 Q. Ms. Lemon, do you have any further testimony?

17 A. No. This concludes my direct testimony.

18 MR. VERHEUL: I have no further questions for
19 this witness.

20 MR. CHAVEZ: Counsel, I assume we're going to
21 keep the witnesses up there for cross-examination?

22 MR. VERHEUL: Yes, as a panel.

23 MR. CHAVEZ: You may proceed.

24 MR. VERHEUL: Thank you.

25 MS. BECKER: With that, we'll turn to the

1 Department's next witness.

2 KRISTINE PINTADO

3 after having been first duly sworn or affirmed,
4 was examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MS. BECKER:

7 Q. Will you please introduce yourself and your
8 current position?

9 A. My name is Kristine Pintado. I am the water
10 quality standards coordinator in the Surface Water
11 Quality Bureau for the Department.

12 I've been in my current position for three
13 years, where my duties include developing proposals to
14 update the surface water quality standards and related
15 Clean Water Act implementation documents.

16 Q. And would you briefly describe your
17 educational background and some of your related work
18 experience?

19 A. I have a bachelor's of science degree in dairy
20 science and a master's of science degree in plant
21 pathology and crop physiology from Louisiana State
22 University.

23 Before joining the Bureau, I worked for 19
24 years in the Louisiana Department of Environmental
25 Quality as an environmental scientist in surface water

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1 quality management and pollution control programs
2 implementing Clean Water Act requirements.

3 My experience includes developing and adopting
4 revisions to water quality standards in New Mexico and
5 Louisiana and drafting surface water discharge permits
6 for industrial and municipal facilities for Louisiana.

7 My resume was filed as the Department's
8 Exhibit 14.

9 Q. And did you also prepare technical testimony
10 for this hearing?

11 A. Yes.

12 My direct testimony was filed as the
13 Department's Exhibit 13.

14 Q. Do you have any corrections or additions to
15 make to that testimony today?

16 A. Yes.

17 After filing the original petition, the Bureau
18 met and worked with other parties to address their
19 concerns, resulting in additional changes to the
20 Department's petition.

21 The latest and most significant changes are in
22 Sections 10 and 16, and I will describe them in more
23 detail in my testimony today.

24 Q. With those noted changes that you just
25 identified, do you adopt your prefiled testimony that

1 was filed on September 4th, 2015, as it is today?

2 A. Yes.

3 Q. And how have changes from your testimony today
4 and from your previously filed testimony been identified
5 for the record?

6 A. The Bureau prepared a document summarizing all
7 changes proposed to date, which was filed with the
8 Commission on September 4th, 2015.

9 I will also identify the latest significant
10 changes to Sections 10 and 16 and their bases in my
11 verbal testimony today.

12 Q. With that, would you briefly overview what is
13 contained within your testimony?

14 A. I will first discuss the Department's proposal
15 for a new temporary standards procedure in Section
16 20.6.4.10 of the New Mexico Administrative Code.

17 From this point on, I will refer to all
18 sections of 20.6.4 of NMAC by section, subsection or
19 paragraph numbers.

20 Then I will discuss updates to piscicide use
21 provisions in Section 16, and the addition of five
22 ephemeral streams in Subsection 97(C).

23 Q. Ms. Pintado, as a result of the notice by
24 Amigos Bravos that piscicide regulations are no longer
25 in contest, would it be appropriate to omit that from

1 your direct testimony today?

2 A. Yes.

3 Q. Okay. In summary, then, let's start with the
4 proposed changes in Section 10 of Subsection F.

5 A. Subsection 10(F) adds a procedure to petition
6 the Commission to adopt a temporary water quality
7 standard, which is regularly referred to as a temporary
8 standard.

9 Q. And what is a temporary standard?

10 A. It is a time limited and less stringent water
11 quality standard for a specific pollutant adopted for a
12 water body while the original standard remains in place.

13 As stated in the proposal, the temporary
14 standard represents the highest degree of protection
15 feasible in the short term and adoption will not cause
16 further impairment or loss of an existing use.

17 Q. How is a temporary standard different from
18 changing the uses or criteria?

19 A. The original and underlying standard,
20 including uses and related criteria, remains as the
21 ultimate goal for the water body.

22 Q. What information did the Bureau consider in
23 drafting the procedures for temporary standards?

24 A. Several elements were considered, including
25 is a temporary standard procedure necessary, what are

1 the regulatory authorities to adopt a temporary standard
2 under the Water Quality Act and the Clean Water Act, is
3 it consistent with federal requirements, what is the
4 state's procedure, how is a temporary standard applied
5 and implemented, is it enforceable, and what are the
6 comments from the public and EPA.

7 Q. After consideration, why is the temporary
8 standard procedure proposed?

9 A. Temporary standards are needed when the
10 standard is not attainable in the near term but can be
11 attainable in the future.

12 The proposal provides for placement of
13 feasible water-quality-based limits in National
14 Pollutant Discharge Elimination System, or NPDES,
15 permits and as conditions for restoration projects to
16 achieve the standard.

17 While the Commission has already adopted
18 regulatory tools, such as use attainability analyses, or
19 UAAs, as discussed by Ms. Lemon, and for site-specific
20 criteria, which are appropriate when uses or criteria
21 are not attainable and should be refined or changed, the
22 Commission has approved the use of compliance schedules
23 to meet water-quality-based permit limits in the near
24 term when appropriate.

25 Yet, temporary standards are different from

1 these other tools, as they allow for a modified standard
2 for a specific time while steps are taken to achieve the
3 original standard.

4 The federal water quality standards
5 regulations allow use of temporary standards, and EPA
6 has shown preference for approving temporary standards
7 as opposed to approving UAAs that downgrade uses.

8 In fact, during the last triennial review, the
9 Bureau committed to developing a proposal allowing
10 temporary standards to be adopted. The Bureau has done
11 that and now seeks the adoption of our petition.

12 Q. What would be the result if the Commission
13 does not adopt the temporary standard procedure?

14 A. If time-limited temporary standards are not
15 allowed, then implementing water quality improvement or
16 restoration projects may not be feasible, progress is
17 stuck, and water quality remains unimproved.

18 The Department may be forced to deny a Clean
19 Water Act Section 401 certification of a federal Section
20 404 or dredge and fill permit. Such actions could be
21 detrimental to water body restoration efforts and to
22 economic conditions in the affected watershed community.

23 Q. And what authorities allow the state to adopt
24 the temporary standards procedure?

25 A. The federal water quality standards

1 regulations, in 40 CFR Sections 131.13 and 14, authorize
2 states to adopt temporary standards, which function as
3 water quality standards for a limited time.

4 Section 74-6-4(D) of the Water Quality Act
5 authorizes the Commission to adopt water quality
6 standards based on credible scientific data and other
7 appropriate evidence.

8 This proposal outlines a public process
9 consistent with requirements in EPA regulations to
10 provide the data and evidence necessary for the
11 Commission to adopt a temporary water quality standard.

12 Q. Have other states adopted such a procedure?

13 A. Yes.

14 According to EPA, at least 42 states have
15 adopted temporary water quality standards procedures,
16 including for temporary standards and for restoration
17 standards.

18 Q. And are the proposed requirements consistent
19 with those in the EPA's water quality standards
20 regulatory clarifications rule that was just finalized,
21 I believe?

22 A. Yes.

23 Q. And when was that finalized?

24 A. On August 21st, 2015.

25 Q. Would you describe the temporary standard

1 procedure then?

2 A. A petitioner would prepare a proposal for a
3 temporary standard based on one of the factors as
4 applied -- as applies for the UAA process described
5 earlier by Ms. Lemon and listed in the Bureau's NOI
6 Exhibit Number 20.

7 The petitioner identifies the water body where
8 it would apply, the pollutant, the highest attainable
9 interim standard and achievable effluent levels as
10 appropriate.

11 A work plan, with tasks and well justified
12 timelines to achieve the original standard, would then
13 be submitted for the Department's review and input.

14 The petitioner would then file the petition
15 and a hearing request with the Commission.

16 From this point, the process would be the same
17 as for adopting a water quality standard, which includes
18 public review.

19 Once approved and adopted by the Commission,
20 the temporary standard is submitted to EPA for approval
21 under Clean Water Act Section 303(c).

22 A written progress report is provided to the
23 Commission for subsequent reviews or at least every
24 three years, as in a triennial review.

25 Q. And how would a temporary standard be applied

1 and implemented?

2 A. The temporary standard would apply to the
3 water body and for a specific pollutant. All other
4 applicable standards would not be affected; in other
5 words, they would not change.

6 The federal regulations allow the temporary
7 standard adopted by the state and approved by EPA to be
8 implemented in federal NPDES permits and for certifying
9 federal actions under Clean Water Act Section 404, such
10 as for dredge and fill permits, or for restoration and
11 reclamation activities.

12 Subsection 12.G, which is already adopted in
13 the water quality standards, is an EPA-approved
14 provision that authorizes compliance schedules;
15 therefore, a compliance schedule may be used with the
16 temporary standard so the permit complies with federal
17 regulations and the Clean Water Act.

18 A temporary standard is not used to describe
19 or assess water quality under Clean Water Act Sections
20 303(d) and 305(b).

21 Q. Would a temporary standard be enforceable?

22 A. Yes.

23 According to the federal regulations, a
24 temporary standard serves as the applicable and
25 enforceable water quality standard for implementing

1 NPDES permit regulations.

2 Subsection 12.H is proposed to be added, so
3 the EPA will apply the temporary standard and associated
4 requirements as enforceable limits and conditions in
5 permits.

6 Q. Did the Bureau make any changes to the draft
7 temporary standard proposal based on comments received?

8 A. Yes.

9 Most comments focused on the state's authority
10 and the federal requirements to adopt temporary
11 standards.

12 The Bureau met with everyone who asked to
13 discuss their concerns and also met after testimonies
14 were filed.

15 Changes were made as a result of discussions
16 with Amigos Bravos, EPA and the San Juan Water
17 Commission, that clarify and improve the temporary
18 standards proposal.

19 Q. Would you briefly summarize the changes to the
20 petition proposal based on those discussions?

21 A. The term "temporary standard" replaces
22 "temporary criteria," as the affected use and criterion
23 are linked together in the temporary standard.

24 The UAA requirement was removed because the
25 underlying uses and criteria do not change.

1 The temporary standard is not limited to
2 impaired waters, and there is no time limit.

3 These changes were also detailed in my
4 prefiled direct testimony.

5 More recent changes include a citation for
6 EPA's final water quality standards regulatory
7 clarifications rule in Subsection F, paragraph 1, to be
8 consistent with the applicable federal requirements just
9 adopted.

10 As suggested by the San Juan Water Commission,
11 and also consistent with the federal regulations,
12 language is added in Subparagraph 10.F(1)(a) to allow
13 for significant stream restoration, such as dam removal.

14 New language in paragraph 4 was added, as
15 recommended by EPA, to require identification of factors
16 that would apply to temporary standards, such as
17 critical low flow.

18 Language is clarified and streamlined in
19 paragraphs 5 through 10 based on suggestions from the
20 San Juan Water Commission.

21 First, it is made clear the work plan is filed
22 with the petition and that only one work plan is
23 necessary.

24 Second, the work plan requirements in
25 paragraphs 5 and 6 are merged into paragraph 5.

1 Third, a written progress report, as suggested
2 by the San Juan Water Commission and Amigos Bravos, is
3 added for the review required in paragraph 8, so there
4 is a basis for the Commission's reevaluation.

5 Fourth, and finally, paragraph 10 was
6 corrected so the Commission reviews requests for
7 extensions and not the Department, and paragraphs
8 renumbered and the citing changed accordingly.

9 Q. So to sum it up, why is the temporary
10 standards proposal important for the State of New
11 Mexico?

12 A. The state has adopted a number of Clean Water
13 Act tools allowing regulatory flexibilities when it is
14 appropriate to revise criteria, such as processes for
15 site-specific criteria, refining designated uses and
16 compliance schedules.

17 A tool or procedure is needed when the
18 original standards are attainable and should not be
19 changed, because downgrading a use or developing a
20 site-specific criterion is not appropriate or allowable
21 in those cases.

22 A temporary standard, as justified in the
23 proposal, may be used as the water-quality-based limits
24 in NPDES permits and as goals for watershed restoration
25 projects.

1 The proposals in Subsections 10.F and 12.H are
2 consistent with the federal regulations and the
3 Commission's authorities under the Water Quality Act and
4 provide a regulatory framework that works to improve
5 water quality over time and ultimately achieve the
6 original standard.

7 Q. Let's turn now to what you identified was
8 Section 97.

9 Would you summarize those proposed additions,
10 please?

11 A. The water quality standards, under Section --
12 Subsection 15.C, allow the use of the Bureau's hydrology
13 protocol, or HP, to support a UAA for ephemeral waters.

14 Mr. Kougioulis will describe the HP and UAA
15 process in more detail in his testimony.

16 In accordance with the HP process in
17 Subsection 15.C and the UAA procedures for entities
18 outside the Department in Subsection 15.D, the Bureau's
19 HP was applied by Freeport-McMoRan to five streams in
20 the Mimbres closed basin.

21 The Bureau concurs that the HP results, final
22 UAA report and conclusions demonstrate these streams --
23 these five streams are naturally ephemeral and proposes
24 listing them in Subsection 97(C).

25 Q. And if possible, Ms. Pintado, can you speak up

1 just a little bit? That would be appreciated.

2 Did the Bureau provide a public comment period
3 for that HP UAA, the hydrology protocol use
4 attainability use analysis report, for those five
5 ephemeral drainages?

6 A. Yes, the HP results and UAA draft were
7 publicly noticed for a 30-day review period from
8 January 15th, 2013, through February 14th, 2014.

9 Q. And were there any changes to the HP UAA
10 report based on public comments?

11 A. Yes.

12 The UAA report was revised by
13 Freeport-McMoRan, as recommended in the comments
14 received, and these changes are in the final HP UAA
15 report dated October, 2014, which is the Bureau's
16 Exhibit 31.

17 Q. And what is the Bureau's position on the five
18 ephemeral drainages?

19 A. Based on the application of the HP and the
20 final October, 2014, UAA report, the five streams are
21 recommended for the Commission's approval to assign
22 ephemeral uses and criteria under Subsection 97(C).

23 The Surface Water Quality Bureau and
24 Groundwater Quality Bureau worked with Freeport-McMoRan
25 and EPA throughout this process and on finalizing the

1 UAA report. At this time, the EPA's technical approval
2 is pending.

3 If the Commission approves these changes, they
4 will be submitted to EPA with the other Commission-
5 approved triennial revisions for final oversight
6 approval under Clean Water Act Section 303(c).

7 Q. With that, Ms. Pintado, is there anything I
8 failed to ask or anything further you would like to say?

9 A. No. That concluded my testimony.

10 MS. BECKER: Okay. It's yours.

11 JODEY KOUGIOULIS

12 after having been first duly sworn or affirmed,
13 was examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. VERHEUL:

16 Q. Mr. Kougioulis, please introduce yourself and
17 outline your professional responsibilities.

18 A. My name is Jodey Kougioulis. And since
19 November of 2011, I've been employed as the quality
20 assurance officer for the New Mexico Environment
21 Department's Surface Water Quality Bureau.

22 I'm responsible for assessing and approving
23 the Bureau's quality assurance and quality control
24 measures related to data collection and data use.

25 I also assist with the development and

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1 implementation of surface water quality standards by
2 analyzing data, researching federal and state
3 requirements, and responding to public comment.

4 Q. Mr. Kougioulis, I would ask you, could you
5 please speak up a little bit to ensure that the audience
6 can hear you?

7 A. Sure.

8 Q. Also, I wanted to clarify your last answer.
9 Have you been with the New Mexico Environment
10 Department since November of 2011 or 2010?

11 A. 2010.

12 Q. Okay. Thank you.

13 A. Sorry.

14 Q. Please describe your professional experience
15 and education.

16 A. Yes.

17 I hold a bachelor of science's degree in
18 environmental engineering from Montana Tech.

19 Prior to joining the Bureau, I was the water
20 resource manager for the Pueblo of Sandia; and before
21 that, I was a hydrologist for the Pueblo of Santa Ana.

22 In both these positions, I worked closely with
23 legal staff in the development, negotiation, and
24 protection of water rights.

25 I've also worked as a hydrologist for the

1 United States Forest Service, as a hydrologic technician
2 for the National Park Service, and as a research
3 specialist for the Montana Bureau of Lands and Geology.

4 In each of these positions, water quality
5 monitoring was a large component of my responsibilities.

6 My complete resume is included as Bureau
7 Exhibit 40.

8 Q. Did you prepare written technical testimony
9 for this public hearing?

10 A. Yes. My written technical testimony was filed
11 as Bureau Exhibit 39.

12 Q. And do you adopt Bureau Exhibit 39 as your
13 sworn testimony for the record in this hearing?

14 A. Yes. I adopt Bureau Exhibit 39 as my sworn
15 testimony, and I also adopt as part of my testimony
16 Proposal A of Bureau Exhibit 46, which is the direct
17 testimony of former Surface Water Quality Bureau
18 employee Ms. Debbie Sarabia.

19 Ms. Sarabia is no longer employed with the
20 Bureau, and I am adopting a portion of her testimony,
21 Proposal A, which is directly related to my own.

22 Q. Has anything changed to your testimony or to
23 your adopted portion of Ms. Sarabia's testimony since
24 they were filed?

25 A. No.

1 Q. Will you please briefly summarize the nature
2 of your testimony regarding proposed changes to the New
3 Mexico water quality standards?

4 A. Yes. I'm presenting the conclusions of two
5 use attainment analyses, or UAAs. Each UAA is based on
6 the use of the Bureau's approved hydrology protocol, or
7 HP.

8 The first UAA, which is part of my direct
9 written testimony, concerns 20 non-perennial water
10 segments associated with 13 National Pollutant Discharge
11 Elimination System permitted facilities in New Mexico,
12 which we simply refer to as NPDES-permitted facilities.

13 The second UAA is Proposal A of Ms. Sarabia's
14 direct testimony, which concerns four perennial waters
15 located in the Pecos River basin and the Tularosa Valley
16 and Mimbres closed basin.

17 In each UAA, we assess site-specific
18 hydrological factors to determine if they are affecting
19 the attainment of designated uses in these non-perennial
20 waters.

21 To do this, we use the HP, which is a
22 technical document that was developed to distinguish
23 between ephemeral, intermittent and perennial waters,
24 streams and rivers in New Mexico.

25 Q. Is the hydrology protocol, or the HP, only

1 used to distinguish between ephemeral, intermittent and
2 perennial waters?

3 A. No. Actually, the HP was developed to not
4 only provide a methodology for distinguishing among
5 hydrologic stream types, but also generate documentation
6 of the existing uses supported by a stream's natural
7 hydrology.

8 The ability to document these uses is key to
9 assuring that the appropriate water quality standards
10 are applied to a water body; specifically, non-perennial
11 waters.

12 Basically, the HP is used to establish the
13 most protective and attainable uses for a particular
14 site based on the naturally existing hydrology. Used in
15 this way, the HP supports the conclusion of the UAA,
16 which addresses the attainment of uses based on existing
17 hydrology. We simply refer to these types of UAAs as HP
18 UAAs.

19 The real goal of an HP UAA, or any UAA, is to
20 establish water quality criteria that neither
21 underprotects nor overprotects for the existing and
22 attainable uses.

23 For the water segments listed in these two HP
24 UAAs, the Bureau found that the highest attainable
25 recreation use currently being achieved is that of

1 secondary human contact and that the highest attainable
2 aquatic life use currently being achieved is limited to
3 aquatic life. In this particular case, this results in
4 the application of less stringent criteria.

5 Q. Were public notices issued for both of these
6 HP UAAs?

7 A. Yes. Both HP UAAs were open to a 30-day
8 public comment period. Notices were sent out to the
9 Bureau's list of interested parties and also published
10 in general circulation newspapers. We also had a 30-day
11 public notice period notice posted to the Bureau's
12 website.

13 Q. Did the Bureau receive any comments on either
14 of these HP UAAs?

15 A. Yes.

16 The UAA concerning the four ephemeral waters
17 located in the Pecos River basin and the Tularosa Valley
18 and Mimbres closed basins received one comment
19 expressing support for the proposal.

20 The UAA associated with the 13 NPDES-permitted
21 facilities also received one comment expressing support
22 for the proposal and one comment expressing concerns
23 regarding the use of the HP.

24 Q. Did the Bureau provide responses to all the
25 comments that were received for both of these HP UAAs?

1 A. Yes.

2 Q. Did the Bureau make any changes in response to
3 the comments it received?

4 A. No. Responses to comments did not require any
5 changes to the HP UAAs.

6 Q. Is a scientific demonstration necessary to
7 change criteria related to the stream segments listed in
8 these two HP UAAs?

9 A. Not in all cases, but if the proposed change
10 is to refine a designated use to a use requiring less
11 stringent criteria, then a scientific demonstration --
12 in this case, a UAA -- is required.

13 The HP was developed to provide the required
14 scientific demonstration addressing one of the UAA
15 eligible factors listed in the Clean Water Act
16 regulations. This particular factor, known as Factor 2,
17 states that natural, ephemeral, intermittent or low-flow
18 conditions or water levels prevent the attainment of the
19 use.

20 So specific to Factor 2, the HP is a
21 methodology used by the Bureau to determine a stream
22 segment in naturally existing hydrology and document the
23 existing and attainable uses based on that hydrology,
24 which is particularly useful in non-perennial waters in
25 New Mexico.

1 So to reiterate the findings, these two UAAs
2 concluded that the proposed stream segments listed in
3 each HP UAA are naturally ephemeral and that the highest
4 attainable uses are that of secondary human contact and
5 limited aquatic life.

6 Q. You mentioned that the hydrology protocol, the
7 HP, is the methodology used by the Bureau which is
8 particularly useful in the determination of appropriate
9 designated uses for non-perennial waters in New Mexico.

10 Why is that?

11 A. Yes. The state has many waters which are
12 specific -- or are not specifically identified by name
13 or segment in the New Mexico water quality standards.

14 Collectively, these waters fall into two
15 categories: perennial or non-perennial.

16 Each category has specific designated uses
17 and criteria that support the Clean Water Act
18 fishable/swimmable uses and criteria.

19 However, among the non-perennial waters, there
20 are actually two types, ephemeral and intermittent, and
21 each has different human contact and aquatic life
22 criteria.

23 The HP is then used to distinguish between
24 ephemeral and intermittent waters to generate the
25 documentation of existing attainable uses based on the

1 naturally existing hydrology.

2 By documenting the site-specific hydrologic,
3 biologic and geomorphic indicators, the appropriate
4 human contact and aquatic life uses and criteria can be
5 assigned to a non-perennial water body.

6 Q. What about perennial waters in New Mexico?
7 Can the HP be used on those as well?

8 A. Yes. The HP provides a methodology for
9 distinguishing among all intermittent, perennial and
10 ephemeral streams and rivers in New Mexico.

11 However, it is particularly useful in
12 distinguishing among non-perennial waters, where the
13 assignment of designated uses and criteria depend on the
14 determination of the naturally existing hydrology and
15 the documentation of the existing and attainable uses.

16 Q. Who is responsible for approving an HP UAA and
17 the resulting changes to criteria?

18 A. Ultimately, this Commission and EPA Region 6,
19 but this occurs after the HP UAA has demonstrated to the
20 satisfaction of the Bureau and EPA Region 6 that certain
21 designated uses are not feasible due to natural,
22 ephemeral, intermittent or low-flow conditions, or water
23 levels which prevent the attainment of that use.

24 Q. Has EPA Region 6 reviewed and provided
25 feedback on these HP UAAs?

1 A. Yes.

2 Technical approval from EPA Region 6 was
3 received for both HP UAAs. In their technical approval,
4 EPA Region 6 concluded that the uses and criteria
5 associated with ephemeral waters in New Mexico can apply
6 to these stream segments listed in the HP UAAs for all
7 regulatory purposes.

8 Q. Did you prepare the HP UAA for the 20 stream
9 segments associated with the 13 NPDES-permitted
10 facilities which are proposed to be listed as ephemeral?

11 A. Yes.

12 Q. Do you support the conclusions that these 20
13 stream segments are ephemeral, based on the evidence
14 supported through the HP UAA?

15 A. Yes.

16 Q. Did you prepare the HP UAA for the four water
17 segments located in the Pecos River basin and Tularosa
18 Valley and Mimbres closed basins, which are proposed to
19 be listed as ephemeral?

20 A. No. This HP UAA was prepared by Ms. Debbie
21 Sarabia.

22 Q. Do you support the conclusions reached by
23 Ms. Sarabia that the four stream segments in the Pecos
24 River basin and in the Tularosa and Mimbres closed
25 basins included in Bureau Exhibit 46, Proposal A, are

1 ephemeral?

2 A. Yes. I have reviewed this HP UAA and support
3 the conclusions that these stream segments are
4 ephemeral.

5 Q. Do you have anything further to add to your
6 testimony?

7 A. No.

8 BRYAN DAIL

9 after having been first duly sworn or affirmed,
10 was examined and testified as follows:

11 DIRECT EXAMINATION

12 BY MR. VERHEUL:

13 Q. Dr. Dail, please introduce yourself.

14 A. Hello. My name is Bryan Dail, and I'm
15 currently employed as an environmental scientist with
16 the New Mexico Environment Department Surface Water
17 Quality Bureau. I've held this position since June of
18 2013.

19 I'm responsible for data assessment in support
20 of standards development and also changes to the
21 existing water quality standards as we find them
22 appropriate.

23 I also assist the Bureau's monitoring and
24 assessment teams and work closely with Mr. Kougioulis,
25 the quality assurance officer, on a number of issues,

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1 including data, quality, and outside proposals to the
2 Bureau.

3 Q. Please describe your education and your
4 professional experience.

5 A. I hold a bachelor degree in biology, with a
6 chemistry as a minor, from the University of New Mexico,
7 and a PhD in microbiology from the University of
8 Georgia, with an emphasis on nutrient cycling.

9 After that, I was a postdoctoral scholar with
10 the Energy Institute in the Department of Agronomy at
11 Penn State University, and I held that position for two
12 years.

13 Prior to joining the Department, I was an
14 assistant professor, then research assistant professor,
15 with the University of Maine.

16 In combination, I held those positions for 12
17 years and operated a research program dedicated to the
18 soil and water sciences, with an emphasis of nutrient
19 cycling, disturbance and environmental change.

20 Q. And was your resume prefiled in this
21 proceeding?

22 A. Yes. My professional resume was filed as
23 Exhibit Number 58.

24 Q. That's the Bureau's Exhibit 58?

25 A. Yes.

1 Thank you.

2 Q. Did you prepare written technical testimony
3 for this hearing?

4 A. Yes. My written technical testimony was
5 previously filed as the Bureau's Exhibit 57.

6 In addition, I will be presenting other
7 prepared testimony on record, Proposal B regarding the
8 Animas River use attainability analysis. This is
9 Surface Water Quality Bureau Exhibit Number 46 and is
10 the direct testimony of former Surface Water Quality
11 Bureau employee, Ms. Debbie Sarabia. I have carefully
12 reviewed this Animas UAA, comments from outside parties
13 and responses to those comments.

14 Q. Has anything changed regarding your testimony
15 or Proposal B of Ms. Sarabia's testimony since these
16 testimonies were prefiled?

17 A. No.

18 Q. And do you adopt Bureau Exhibit 57 and
19 Exhibit 46 as your sworn testimony for the record in
20 this hearing?

21 A. Yes, I do.

22 Q. Can you briefly summarize the nature of your
23 testimony and adopted testimony regarding proposed
24 changes to the water quality standards?

25 A. Yes.

1 Today, I'll be presenting three changes --
2 proposed changes to the Administrative Code.

3 The first was an error in segment
4 identification within the Gila basin, and the second and
5 third proposals are for use attainability analyses
6 regarding current aquatic life uses for the Animas and
7 Mimbres basins.

8 Q. Please describe your findings for the three
9 proposals that are before the Commission.

10 A. Well, first, we identified an error at segment
11 503, or 503, in the Gila basin description,
12 misidentifying part -- or a section of the West Fork
13 Gila River, near the town of Gila Hot Springs, as the
14 main branch of the Gila River.

15 The Bureau relies upon United States
16 Geological Survey, or USGS, maps to identify proper
17 place names and in adopting the proper name
18 descriptions.

19 We needed to also consider the different water
20 quality criteria associated with the branches of the
21 Gila, the west fork and the main stem.

22 A map included in filed testimony, Exhibit 59,
23 illustrates our problem. Because the West Fork Gila and
24 the main stem of the Gila have different specific
25 conductance criteria, we then investigated water quality

1 data to see if this misidentified section could maintain
2 the lower specific conductance associated with the rest
3 of the west fork of the Gila.

4 Q. And what did you find?

5 A. We determined that the west fork of the Gila
6 below the town of Gila Hot Springs could indeed meet the
7 most stringent specific conductance criteria and,
8 therefore, that criteria should be applied to the entire
9 length of the West Fork Gila.

10 Q. And what about the other proposals, Dr. Dail?

11 A. Second, we demonstrated a necessary refinement
12 of aquatic life uses for the Animas River in Northwest
13 New Mexico through the use attainability analysis.

14 The UAA demonstrated that the current
15 designated uses in the Animas were improperly identified
16 and that the preponderance of evidence supported an
17 aquatic life use change from marginal cold-water and
18 cold-water uses to cool-water aquatic life uses.

19 Specifically, segments 403 and 404 were found
20 to need adjustment to the aquatic life use, and that
21 this is a result of local climate; for example, air
22 temperatures which drive the natural temperature regimes
23 of these segments in the stream.

24 These segments can support the cool-water use
25 assignment. Both historical and recent fish assemblages

1 and their thermal preferences confirmed this finding.

2 The last proposal I'm presenting is a similar
3 refinement for the aquatic life uses for the Mimbres
4 River in Southwestern New Mexico.

5 For the Mimbres UAA, two segments, 803 and
6 804, have aquatic life uses of cold water and high-
7 quality cold water, respectively. Temperature records,
8 the ecological setting and native fish data strongly
9 suggested these were not properly assigned aquatic life
10 uses.

11 We propose keeping the high-quality cold-water
12 segment only for the uppermost wilderness-bound sections
13 of the 804 segment of the Mimbres, and we propose making
14 this headwater segment shorter to indicate this and
15 renumbering it as segment 807; assign the remainder of
16 the segment 804, from the headwater eco-regional
17 boundary at Cooney Canyon downstream to Allie Canyon, as
18 a cold-water aquatic life use; and the Mimbres, as it
19 heads into the Chihuahuan eco-regional zone, assigning a
20 cool-water use, which is more appropriate to the fish
21 community and the achievable temperatures therein, and
22 this would be segment 803.

23 Q. Was there public participation in the
24 development of these proposals?

25 A. Yes. Both UAAs were posted to our website as

1 public drafts. Public draft notices were published in
2 several newspapers. Notices were also e-mailed to the
3 Bureau's interested parties' e-mail list and made
4 available upon request.

5 The Gila segment changes were open to public
6 comment via a 30-day triennial or public draft release.

7 The public comment period on the draft Animas
8 River UAA opened November 18th, 2013, and closed
9 December 20th, 2013. A public meeting was held in
10 Farmington, New Mexico, on Tuesday, December 17th, 2013,
11 to present and discuss the draft UAA.

12 The Mimbres UAA was on draft public notice for
13 review and comment during the April 1st through May
14 30th 60-day period. Additionally, the public draft on
15 Mimbres was made available in multiple hard copies at a
16 public meeting for the Upper Gila, San Francisco and
17 Mimbres TMDL on July 10th, 2014.

18 Q. Did the Bureau receive comments on any of the
19 proposals that you are presenting today?

20 A. The Bureau received no comments on the Gila
21 segment corrections, nor on the Mimbres use
22 attainability analysis; however, six comments were
23 received for the Animas UAA.

24 Regarding the Animas comments, the Bureau
25 received supporting commentary from the Animas Watershed

1 Partnership, the San Juan Watershed Group, the Southern
2 Ute Indian Tribe, the Southwestern Water Conservation
3 District, and the San Juan Water Commission.

4 The San Juan Water Commission was generally
5 supportive; however, suggested some reevaluation of data
6 supporting one segment's aquatic life use assignment.
7 This reevaluation was made and minor changes, supported
8 by the available data, the San Juan Water Commission and
9 the Bureau, allowed us to alleviate the concern.

10 EPA Region 6 also provided numerous comments
11 and edits, which were resolved and included in a final
12 version of the Animas UAA, which then received technical
13 approval from EPA Region 6 in November of 2014.

14 Q. Did the Bureau provide responses to all the
15 comments that it received?

16 A. Yes.

17 Q. Has anything changed since you -- since your
18 written testimony was filed?

19 A. Yes. There was one change, and the Bureau's
20 Mimbres UAA received a technical approval letter and
21 supporting documentation in May of 2015.

22 Q. And who was that letter from?

23 A. It was from EPA Region 6.

24 Q. And what is the significance of a technical
25 approval letter?

1 quagga mussels out of our state.

2 Q. Did you prepare any written technical
3 testimony for this hearing?

4 A. No, I did not.

5 Q. Are you only providing verbal testimony then
6 today?

7 A. Yes.

8 Q. And what is the nature of that testimony?

9 A. Essentially, I'm here to express my interest
10 and support for the proposed changes to the piscicide
11 rule.

12 Q. The piscicide rule as proposed by the New
13 Mexico Environment Department?

14 A. That is correct, yes.

15 Q. Do you have anything to add to that?

16 A. No.

17 MR. VERHEUL: Thank you.

18 That concludes our direct testimony.

19 MR. CHAVEZ: Okay. I'd like to go to the
20 parties first for cross-examination.

21 I think we can start this way.

22 Do you have any cross-examination for the
23 witnesses?

24 MS. McCALEB: Yes, Mr. Hearing Officer, I do.

25 MR. CHAVEZ: Come up.

1 MS. McCALEB: It's, hopefully, short.

2 MR. CHAVEZ: No problem.

3 MS. McCALEB: Good afternoon, Mr. Hearing
4 Officer, Mr. Chair, Members of the Commission.

5 My name is Jolene McCaleb. I'm an attorney
6 for the San Juan Water Commission. I have just a bit of
7 a short cross-examination, a few questions to ask you.
8 I believe most of it will be directed most likely at
9 Ms. Lemon, but if any of you have anything to add,
10 please feel free to jump in. I understand that you are
11 being examined as a panel.

12 CROSS EXAMINATION BY MS. McCALEB

13 MS. McCALEB: I would like to start with the
14 topic of the stream segments, the nine stream segments,
15 that are proposed to be changed from the previous
16 designated use of secondary contact to primary contact,
17 and I do believe that Ms. Lemon provided most of the
18 direct testimony on that topic.

19 Ms. Lemon, do you know when the nine segments
20 that the Department proposes to designate as primary
21 contact were first designated as secondary contact?

22 MS. LEMON: It's variable. It goes back to
23 1988 and 2005. There was -- there were some segments
24 that were designated in the last triennial review.

25 Is there a segment specific that you're

1 looking for?

2 MS. McCALEB: No, ma'am. I just wanted to get
3 a general idea of whether some of them have been around
4 for decades and whether some were more recent, and that
5 provides the information I needed.

6 It looks like some -- some segments were
7 designated then as secondary contact, as you said, back
8 in the 1980s, and then some more recently, as recent as
9 the last triennial review.

10 Is that correct?

11 MS. LEMON: Yes.

12 MS. McCALEB: Thank you.

13 And at the time these segments were designated
14 as secondary contact uses, EPA did not object to those
15 designations. Is that correct?

16 MS. LEMON: As far as I'm aware of, no, they
17 did not.

18 MS. McCALEB: And at that time the EPA did not
19 require a UAA proving that primary contact was not the
20 more appropriate designated use?

21 MS. LEMON: As far as I'm aware, no, they did
22 not.

23 In the 2009 triennial -- in the last
24 triennial, they did require use attainability analyses
25 for the ephemeral designation, which was a secondary

1 contact designated use.

2 MS. McCALEB: But they did not require a UAA
3 with regard to any of the nine stream segments we're
4 talking about right now?

5 MS. LEMON: At the time, I am not aware of
6 that. No.

7 MS. McCALEB: Okay. And has the Environment
8 Department received any sort of a letter from EPA
9 demanding that these segments be upgraded to primary
10 contact?

11 MS. LEMON: We have not received a letter from
12 EPA indicating that.

13 It is required for the Department and the
14 Bureau to review any water quality segments with these
15 non-fishable/swimmable uses, we're required to review
16 those, and in our review for this triennial review, we
17 noted that there was primary contact recreation
18 occurring on these nine stream segments, and that's why
19 they are being proposed for upgrades.

20 MS. McCALEB: And you testified that the
21 upgrade needs to be based on new information showing
22 that primary contact is an attainable use, is that
23 correct?

24 MS. LEMON: On new information and review,
25 yes.

1 MS. McCALEB: Okay. And you either need to
2 show that the primary contact use is attainable or is
3 already an existing use, is that correct?

4 MS. LEMON: That is correct.

5 MS. McCALEB: What is the definition of
6 primary contact in the surface water standards?

7 MS. LEMON: I will read directly.

8 MS. McCALEB: I believe it's at 20.6.4.7.P(5).

9 MS. LEMON: "'Primary contact' means any
10 recreational or other water use in which there is a
11 prolonged and intimate human contact with the water,
12 such as swimming and water skiing, involving
13 considerable risk of ingesting water in quantities
14 sufficient to pose a significant health hazard. Primary
15 contact also means any use of surface waters of the
16 state for cultural, religious or ceremonial purposes in
17 which there is intimate human contact with the water,
18 including but not limited to ingestion or immersion,
19 that could pose a significant health hazard."

20 MS. McCALEB: And it's your position that the
21 testimony that you have provided provides information
22 that shows that each of the nine segments have
23 activities that would fall within the definition of
24 primary contact. Is that correct?

25 MS. LEMON: That's correct.

1 MS. McCALEB: I would like to go through each
2 of those nine segments, if we can, please, and look at
3 both the information that was provided in the Bureau's
4 petition under bases for change and also the direct
5 testimony that was filed by Ms. Pintado.

6 And for Ms. Pintado's direct testimony, that's
7 the Bureau's Exhibit Number 13, starting on page 77-89.
8 And for the statement of basis with the petition, that
9 would be the Department's original petition, beginning
10 on page 17.

11 MR. VERHEUL: Mr. Hearing Officer --

12 MR. CHAVEZ: Yes.

13 MR. VERHEUL: -- I think this is in the form
14 of an objection.

15 I would ask that we make references to the
16 latest filing of the Environment Department, the
17 September 4th second revised petition, so that we're all
18 working off the same document.

19 MS. McCALEB: If I recall correctly, the
20 second revised petition did not contain the statement of
21 basis.

22 MR. CHAVEZ: Counsel, can you confirm that it
23 did not?

24 MR. VERHEUL: Yes. That's correct.

25 MS. McCALEB: So is it all right to proceed

1 with the original petition?

2 MR. VERHEUL: I withdraw any objection.

3 MR. CHAVEZ: Great.

4 Thank you.

5 MS. McCALEB: Thank you.

6 MS. PINTADO: What was the first exhibit?

7 MS. McCALEB: The first exhibit was Exhibit
8 Number 13, which was Ms. Pintado's written direct
9 testimony, beginning at page, I believe, 77-89.

10 MS. PINTADO: Okay.

11 MS. McCALEB: And the other exhibit was the
12 Department's June, 2014, original petition, and I'm
13 sorry, my copy does not have the exhibit number.

14 MR. VERHEUL: It's Exhibit 2.

15 MS. McCALEB: Thank you.

16 MR. VERHEUL: Page 17.

17 MS. LEMON: 17?

18 MS. McCALEB: Yes, page 17.

19 MS. LEMON: We'll get there. Okay.

20 MS. McCALEB: Thank you.

21 As I looked through both the Department's
22 statement of basis and Ms. Pintado's direct testimony,
23 it appears that for each stream segment you state that
24 "The Bureau has no evidence that this use is not
25 attainable and primary use may be existing and primary

1 contact use is likely attainable."

2 Is that correct?

3 MS. LEMON: Is that for me or for Ms. Pintado?

4 MS. McCALEB: For either. For example, maybe
5 I can point you to it.

6 Ms. Pintado, in your direct testimony, for
7 example, on page 79-89, for -- let's say number four
8 there, Section 20.6.4.116, beginning on line six, "The
9 SWQB has no evidence that this use is not attainable and
10 information indicates that primary contact use may be an
11 existing use as defined under 20.6.4.7.E(3) NMAC and
12 likely attainable."

13 Do you see that?

14 MS. PINTADO: Yes.

15 MS. McCALEB: And I have seen that language
16 in your direct testimony with respect to all nine
17 segments.

18 Would that be correct?

19 MS. PINTADO: Yes.

20 MS. McCALEB: And then to tie that up with the
21 statement of basis and the Department's petition, for
22 example, on page 17, with respect to segment 20.6.4.103,
23 in the basis of change, you have almost the same
24 language in the next-to-the-last sentence, "The Bureau
25 has no evidence that this use is not attainable and

1 primary contact use may be existing and is likely
2 attainable."

3 Is that correct?

4 MS. PINTADO: Yes.

5 MS. McCALEB: Is it the Bureau's position that
6 no evidence a use is not attainable is the same showing
7 as evidence that a use is attainable?

8 MS. PINTADO: Based on the rebuttable
9 presumption, yes.

10 MS. McCALEB: And is it the Department's
11 position that a determination that primary use may be
12 existing is the same as evidence that a use is existing?

13 MS. PINTADO: Yes.

14 MS. LEMON: Yes.

15 MS. McCALEB: And it's your conclusion that
16 primary -- because primary contact use is likely
17 attainable, that's the same as evidence that the use is
18 attainable?

19 MS. PINTADO: Yes.

20 MS. McCALEB: Let's look at these segments
21 individually, beginning with segment 20.6.4.103.

22 And you state -- or, I'm sorry, the Bureau
23 states in its petition that "While swimming in this area
24 is 'at your own risk,' this portion of the Rio Grande is
25 accessible for swimming and bodily contact can occur

1 with a risk of ingesting water."

2 Is it the Bureau's position that if a water is
3 accessible that it must be assumed that swimming is a
4 use that is occurring in that water?

5 MS. PINTADO: Yes.

6 MS. LEMON: We do have evidence that swimming
7 is likely for -- or water-based recreation, with the
8 result of possible immersion or ingestion, is occurring
9 in these nine stream segments.

10 MS. McCALEB: But in the basis for change and
11 in the direct testimony -- for example, for this
12 segment, you state that swimming in the area is at your
13 own risk.

14 And what evidence has been provided of that
15 other than this statement?

16 MS. LEMON: There are hot springs located
17 right on the river, and there is swimming that does
18 occur, that we have Bureau staff who have witnessed
19 swimming not only in this segment but in other segments,
20 or boating and water-based recreation, that could
21 possibly meet the definition -- that could meet the
22 definition of primary contact.

23 MS. McCALEB: And is all the evidence you have
24 of that nature provided in the Department's Rebuttal
25 Exhibit 2?

1 MS. PINTADO: Yes.

2 MS. LEMON: And you provided this as an
3 exhibit. What is that exhibit?

4 Yes.

5 MS. McCALEB: And has the Bureau provided any
6 evidence at all other than this Rebuttal Exhibit 2
7 showing evidence of primary contact use in these nine
8 stream segments?

9 MS. LEMON: No.

10 MS. McCALEB: Okay. Could we take a look at
11 this Rebuttal Exhibit 2, please?

12 I notice it does not have a date on it. Can
13 you tell me when it was prepared?

14 MR. DAIL: I believe that's the memo --

15 MS. LEMON: Yes.

16 MR. DAIL: -- from Bryan Dail.

17 MS. McCALEB: Yes.

18 MR. DAIL: That was prepared over the course
19 of several months prior to submission of testimony, the
20 NOI.

21 MS. McCALEB: Prior to the Department's
22 submission of its NOI?

23 MR. DAIL: Correct.

24 MS. McCALEB: Can you tell me why it wasn't
25 referred to in any of the direct testimony and it was

1 provided only after all rebuttal testimony had been
2 filed -- or it was provided with the rebuttal testimony?

3 MS. PINTADO: It was finalized for rebuttal.
4 It was finalized for rebuttal.

5 MS. McCALEB: Okay. So you did not intend to
6 rely on this when you provided your direct testimony?

7 MS. PINTADO: I wouldn't necessarily say that.
8 It was provided for rebuttal, when it was necessary.

9 MS. McCALEB: And could we look at page three,
10 please, of Exhibit -- Rebuttal Exhibit 2?

11 With regard to segment 103 in the Rio Grande
12 basin, the Department is relying solely on a website
13 describing public pools accessible for swimming at your
14 own risk. Is that correct?

15 MR. DAIL: If I might interject. Bryan Dail.

16 Segment 103 relies on web-based information,
17 but also Department personnel who have witnessed
18 kayaking on that segment and swimming.

19 MS. McCALEB: And where have you provided
20 evidence of Department personnel stating that they have
21 witnessed kayaking at that segment?

22 MR. DAIL: It was a personal communication
23 that may not have made it to that document.

24 MS. McCALEB: So that evidence has not been
25 presented in this hearing, is that correct?

1 MR. DAIL: Not to my knowledge.

2 MS. McCALEB: And let's look at segment number
3 116 of the Rio Grande basin.

4 This memo notes that Ojo Caliente Hot Springs
5 is in that segment and rafting and float trips have been
6 observed.

7 MR. DAIL: Yes.

8 MS. McCALEB: Observed -- who observed those
9 float trips?

10 MR. DAIL: Often it's Departmental personnel,
11 in the context of them performing surveys, which occur
12 probably between May and September of the year -- of the
13 survey year that would have included those segments.

14 MS. McCALEB: But there is no evidence
15 provided here of who saw the rafting and float trips and
16 when, is that correct?

17 MS. LEMON: Footnote 3 does. It says, "Bureau
18 staff has observed rafting and float trip on this
19 segment. The Bureau of Land Management offers rafting
20 activities on lower and upper segments of the Rio
21 Chama."

22 MS. McCALEB: And the BLM information is based
23 on their website, is that correct?

24 MS. LEMON: And from our own information, yes.

25 MS. McCALEB: And from your own information.

1 But you do not provide any information about what staff
2 observed the rafting or when, is that correct?

3 MS. LEMON: It's Bureau monitoring staff. Our
4 monitoring staff.

5 Do you need a specific name?

6 MS. McCALEB: I'm just asking --

7 MS. LEMON: Is that what you're looking for?

8 MS. McCALEB: I'm just asking, other than this
9 statement that Bureau staff has observed it, there is no
10 evidence provided about who observed it and when; is
11 that correct?

12 MS. LEMON: That's correct.

13 MS. McCALEB: And there is no evidence
14 provided about any documentation that the Department has
15 indicating that this was observed. Is that correct?

16 MS. LEMON: That's correct.

17 MS. McCALEB: With regard to segment 124, what
18 evidence is there that privately owned hot springs
19 provide evidence of existing contact recreation use?

20 MR. DAIL: In historical documents on that
21 particular segment, it includes a private in-holding
22 within what is now the park which was developed for hot
23 springs use. It is not currently used, but there is
24 indication that attainability, post Water Quality Act
25 November 25th --

1 MS. PINTADO: 1975.

2 MR. DAIL: -- 1975, has indeed occurred.

3 MS. McCALEB: But it's not currently being
4 used as such, is that correct?

5 MR. DAIL: I don't believe so.

6 MR. KOUGIOULIS: But, by definition, an
7 existing use since -- it was since 1975.

8 MS. McCALEB: But post-1975, the Water Quality
9 Control Commission designated this with a secondary
10 contact use. Is that correct?

11 MR. DAIL: I believe so.

12 MS. McCALEB: With regard to segment 206 in
13 the Pecos River basin, on page five, this is a segment
14 -- Pecos River from Brantley Reservoir to Salt Creek,
15 and the notes indicate simply that Brantley Reservoir
16 downstream of this segment has primary contact use. Is
17 that correct?

18 MR. DAIL: Correct.

19 MS. McCALEB: Is there any evidence provided
20 here that this segment upstream of Brantley Reservoir
21 has primary contact use?

22 MR. DAIL: Well, not that I submitted for this
23 particular memo, unless it's listed -- it's footnoted.

24 MS. LEMON: No. But we do need to protect
25 downstream uses.

1 MS. McCALEB: The basis for your proposal to
2 upgrade the use here is because primary use is an
3 existing -- primary contact is an existing or attainable
4 use, correct?

5 MS. LEMON: I would have to look at our basis
6 for change.

7 Under the basis of change for segment 206, it
8 says, "The Department has no evidence that this use is
9 not attainable and information indicates that primary
10 contact use may be existing and is likely attainable.
11 To be consistent with the latest EPA recommendations for
12 recreational contact and Clean Water Act Section 101(a)
13 goals, the designated use for secondary contact is
14 upgraded to the primary contact use with corresponding
15 criteria."

16 MS. McCALEB: And that's the same statement
17 that the Bureau has made in each basis of change for
18 these nine segments, correct?

19 MS. LEMON: I would have to check.

20 MS. McCALEB: And there is nothing in this
21 statement of basis about needing to protect downstream
22 uses, correct?

23 MS. LEMON: Not in this one. As far as I can
24 tell.

25 MS. McCALEB: With regard to segment 213 in

1 the Pecos River basin, which is McAllister Lake, this
2 memo notes that McAllister Lake is publically accessible
3 for camping, boating and fishing when open. There is no
4 statement here about swimming.

5 Was that an oversight, or was it an assumption
6 that because there is boating, there will also be
7 swimming?

8 MS. LEMON: It is likely -- or it is a
9 possibility that somebody could be immersed in the
10 water, either accidentally or on purpose, if there is
11 boating occurring on the lake.

12 MS. McCALEB: And what is the definition of
13 secondary contact use?

14 MS. LEMON: Do you have it?

15 "'Secondary contact' means any recreational or
16 other water use in which human contact with the water
17 may occur and in which the probability of ingesting
18 appreciable quantities of water is minimal, such as
19 fishing, wading, commercial and recreational boating and
20 any limited seasonal contact."

21 MS. McCALEB: So in its water quality
22 standards, the Commission has determined that
23 recreational boating is a secondary contact use;
24 correct?

25 MS. LEMON: Yes.

1 MS. McCALEB: And with regard to McAllister
2 Lake, there is a footnote here about accidental water
3 alteration and algal bloom that caused a fish kill which
4 has limited fishing in the lake since 2007.

5 So if fishing in the lake is limited, would
6 that necessarily also mean that perhaps any swimming, if
7 any, is also limited?

8 MS. LEMON: I can't answer that. I don't
9 know.

10 MS. McCALEB: But you've provided no evidence
11 that the primary contact use of swimming is occurring at
12 McAllister Lake, correct?

13 MS. LEMON: Our assumption, as I stated
14 before, is that if there is water-based recreation, such
15 as kayaking, boating, fishing, swimming, that when
16 you're on top of the water, there is a probability that,
17 either accidental or on purpose, you will go swimming,
18 and there is a potential for that risk of ingestion of
19 water.

20 MS. McCALEB: But under the definitions of New
21 Mexico Surface Water Quality Standards, fishing, wading
22 and boating are secondary contact uses; correct?

23 MS. LEMON: Correct.

24 MS. McCALEB: Are you familiar with 74-6-4(D)
25 of the New Mexico Water Quality Act, which provides that

1 surface water quality standards adopted by this
2 Commission must be based on credible scientific data and
3 other evidence appropriate under the Act?

4 MS. LEMON: Yes. And we found no evidence for
5 the secondary contact use. No scientific support for
6 that use to be applied.

7 And based on the rebuttable presumption that
8 all waters are fishable/swimmable, that would mean
9 primary contact use should be implemented in these
10 segments.

11 MS. McCALEB: And EPA -- you testified that
12 EPA, after the 2005 triennial review, talked about the
13 need to do a UAA for -- before ephemeral waters could be
14 designated with non-101(a)(2) uses; correct?

15 MS. LEMON: Yes.

16 MS. McCALEB: And a UAA is required to
17 downgrade the use to secondary contact or limit aquatic
18 life, correct?

19 MS. LEMON: Not just for ephemeral waters.
20 Correct.

21 MS. McCALEB: Okay. Correct.

22 EPA issued that determination or made its
23 position known with respect to an activity where the
24 Water Quality Control Commission was, in the first
25 instance, designating a use; is that correct?

1 MS. LEMON: In the -- are you referring -- can
2 you rephrase that?

3 MS. McCALEB: Yes.

4 During the 2005 triennial review, the Water
5 Quality Control Commission drew an objection from EPA
6 because it was at that time designating certain streams
7 as having secondary contact uses and limited aquatic
8 life uses. Is that correct?

9 MS. LEMON: I would have to look at their
10 record of decision for their basis for these segments,
11 because -- do we have that? I don't have it.

12 MS. PINTADO: I don't think we do.

13 MS. McCALEB: Let me ask the question another
14 way.

15 Do you have any evidence that EPA has stated
16 that you must have a UAA supporting a previously
17 designated use of secondary contact?

18 MS. LEMON: Yes. We are supposed to review
19 any segments that do not meet the fishable/swimmable
20 goals, and if there is no UAA or other scientific
21 evidence to support that lesser designation, then we are
22 required to evaluate and see if that use is attainable
23 in this segment or existing in the segment.

24 MS. McCALEB: And where in the direct
25 testimony or any of the exhibits that you've provided is

1 there evidence that you have to do a UAA?

2 What I see in the direct testimony is the
3 statement "If any new information has become available,
4 if such new information indicates that the uses
5 specified in Section 101(a)(2) are attainable, the state
6 shall revise its standards accordingly." And that was
7 in Ms. Pintado's direct testimony at page 77-89.

8 MS. PINTADO: Right.

9 MS. McCALEB: And so all of the new
10 information that you have found is provided in SWQB
11 Rebuttal Exhibit 2, is that correct?

12 MS. LEMON: Yes.

13 MS. McCALEB: If the Water Quality Control
14 Commission approves your petition on these nine segments
15 and changes their designated uses from secondary contact
16 to primary contact, if in the future there is a need to
17 downgrade that use, a UAA will be required. Is that
18 correct?

19 MS. LEMON: There should be a UAA to designate
20 it as secondary contact right now.

21 MS. McCALEB: But it's already been designated
22 as secondary contact in some cases for decades, correct?

23 MS. LEMON: It's been -- it has been for
24 possibly since the '80s.

25 I mean, on Exhibit 2, it doesn't say the

1 specific date that the actual secondary contact use was
2 adopted, so I would have to go through the history and
3 look up to see when -- exactly the date that it was
4 adopted, but it is possible that it's been decades, yes.

5 MS. McCALEB: Okay. And one other basis of
6 support for the Bureau's position with regard to these
7 nine segments is set out in Ms. Pintado's direct
8 testimony at page 77-89 where you refer to the latest
9 EPA guidance for recreational contact, which is the
10 Bureau's Exhibit Number 37.

11 MS. PINTADO: Yes.

12 MS. McCALEB: And could you please look at
13 Exhibit Number 37?

14 MS. PINTADO: Yes. Got it.

15 MS. McCALEB: Could you please read the first
16 sentence?

17 MS. PINTADO: "EPA has released its 2012
18 recreational" -- "EPA has released its 2012 recreational
19 water quality criteria (RWQC) recommendations for
20 protecting human health in all coastal and non-coastal
21 waters designated for primary contact recreation use."

22 MS. McCALEB: So this is additional guidance
23 from EPA about water quality criteria for human health
24 in those waters that have been designated with the
25 primary contact designated use, correct?

1 MS. PINTADO: Yes. Yes.

2 MS. McCALEB: And nowhere in this document
3 does it say that it's applicable to waters designated
4 with the secondary contact designated use. Is that
5 correct?

6 MS. PINTADO: Correct.

7 MS. McCALEB: Well, we're finished with that
8 topic.

9 Thank you.

10 MS. PINTADO: I do want to add one thing.

11 You asked about a letter from EPA -- or
12 recommendations on designating or approving secondary
13 contact uses.

14 MS. McCALEB: Yes.

15 MS. PINTADO: Generally, EPA will write an
16 approval or disapproval to a state on those provisions
17 that are being changed. If the state does not submit
18 those revisions to EPA, they may not speak to them.

19 But in the letter dated January 10th, 2007,
20 EPA's review of amendments during the 2005 revisions,
21 specifically say, "EPA was unable to take action on the
22 limited aquatic life, aquatic life and/or secondary
23 contact recreation use designations for Sections 97, 98
24 and 99. Similarly, EPA was unable to take action on the
25 new and revised use designations and modifications for

1 six classified segments because adequate supporting
2 documentation, such as a use attainability analysis, was
3 not available to support the modifications. See
4 segments 126, 128, 221, 310, 702 and 701."

5 MS. McCALEB: So that answers the question I
6 had about whether EPA's position was made known in
7 response to actions being taken by this Commission to
8 either make new designations or change previously made
9 designations. Is that correct?

10 MS. PINTADO: Right.

11 MS. McCALEB: And there is nothing there that
12 indicates EPA is applying that same standard to
13 designations that were made perhaps as early as the late
14 1980s, correct?

15 MS. PINTADO: Not in this letter, no.

16 MS. McCALEB: Thank you.

17 Now, I would like to move to the Bureau's
18 temporary standards proposal.

19 Ms. Pintado, I believe most of these questions
20 will likely be for you.

21 MS. PINTADO: Okay.

22 MS. McCALEB: In your direct testimony, you
23 cited EPA's recent proposed changes to the federal water
24 quality standards regulations concerning variances, is
25 that correct?

1 MS. PINTADO: Yes.

2 MS. McCALEB: And that's the regulation that
3 was just issued in early September --

4 MS. PINTADO: Yes.

5 MS. McCALEB: -- and I believe goes into
6 effect next week?

7 MS. PINTADO: That's correct.

8 MS. McCALEB: Although the Bureau has elected
9 to term its proposal as a temporary standard, in effect,
10 it accomplishes the same thing as what EPA is calling a
11 variance. Is that correct?

12 MS. PINTADO: It would be a subcategory of
13 what EPA terms a water quality standards variance.

14 MS. McCALEB: Okay. Yes. My mistake. I'm
15 sorry, you're right. I've gotten so used to calling it
16 a variance that I forget EPA calls it a water quality
17 standards variance.

18 In EPA's new rule, is it true that EPA makes
19 it clear that a water quality standards variance is a
20 legal tool?

21 MS. PINTADO: Yes.

22 MS. McCALEB: And, in fact, a water quality
23 standards variance is in itself a water quality
24 standard, is that correct?

25 MS. PINTADO: That's correct.

1 MS. McCALEB: And the Bureau has now amended
2 its petition to make its proposal more consistent with
3 the final EPA rule. Is that correct?

4 MS. PINTADO: Yes. For those -- as applicable
5 to a body water, that's correct.

6 MS. McCALEB: Right.

7 Now that you know what EPA's final rule is, it
8 was necessary to make changes, including adding the
9 language about restoration activities; is that correct?

10 MS. PINTADO: We did add that language, yes.

11 MS. McCALEB: And you would agree with
12 information provided in the preamble to the rule that
13 water quality standards variances are important to allow
14 flexibility while progress is being made toward
15 achieving the original underlying designated uses in
16 water quality standards. Is that correct?

17 MS. PINTADO: Yes.

18 MS. McCALEB: And it's the Bureau's position
19 that the proposed temporary standard is a much needed
20 tool to provide flexibility in the State of New Mexico
21 to make progress toward meeting water quality standards
22 that for whatever reason are not being met at this point
23 in time, is that correct?

24 MS. PINTADO: Under certain conditions, yes.

25 MS. McCALEB: You referred earlier to 40 CFR

1 131.14, which is the new water quality standards
2 regulation rule. Correct?

3 MS. PINTADO: Yes.

4 MS. McCALEB: And do you have a copy of the
5 new rule?

6 MS. PINTADO: Yes.

7 MS. McCALEB: In the August 21st, 2015,
8 Federal Register, at page 51047 --

9 MS. BECKER: Could you please identify if
10 that's an exhibit.

11 MS. McCALEB: Yes. I was going to actually
12 ask a question of whether -- I know the Bureau cited
13 this in the previous -- in the most recent filing, but I
14 didn't see that the Bureau made it an exhibit.

15 Is that correct?

16 MS. PINTADO: That's correct.

17 MS. BECKER: For clarity, you're referring to
18 not the proposed rule but the final rule?

19 MS. McCALEB: The final rule, yes.

20 MS. BECKER: Okay. That is correct.

21 MS. McCALEB: If it would be helpful, I do
22 have copies that we could make an exhibit and enter into
23 the record, if that would be appropriate, if it would be
24 helpful for review.

25 MS. BECKER: If you're going to ask the

1 witness a question about the rule, you can first ask if
2 she has knowledge, and if not, she'd like to see a copy.
3 I'll let her answer that.

4 MS. McCALEB: Okay. Thanks.

5 Ms. Pintado, have you had an opportunity to
6 fully review the new EPA rule?

7 MS. PINTADO: I have reviewed more fully the
8 section on water quality standards variances.

9 MS. McCALEB: And you actually have a copy of
10 the new rule --

11 MS. PINTADO: I do.

12 MS. McCALEB: -- before you?

13 I'm sorry, I lost my place for a moment.

14 Back at page 51047, which would be Section
15 131.3(o) of the new EPA rule, there is a definition of a
16 water quality standards variance.

17 Do you see that? It's on the left-hand
18 column, toward the top, Subsection O.

19 MR. SCHLENKER-GOODRICH: Mr. Hearing Officer,
20 may I interject?

21 Jolene, you said you had copies of the final
22 rule.

23 MS. McCALEB: I do.

24 MR. SCHLENKER-GOODRICH: May I have a copy?

25 MS. McCALEB: Mr. Hearing Officer, would it be

1 appropriate for me to distribute copies?

2 MR. CHAVEZ: Yes. That's fine.

3 MS. McCALEB: Thank you.

4 MR. CHAVEZ: Counsel, I'm not asking you to
5 limit your cross on this issue. As soon as you're done,
6 I want to take a 10-minute break, and then you can
7 continue, if that's okay with you.

8 MS. McCALEB: Yes, sir, that would be fine.

9 This shouldn't take very long before we can break.

10 MR. CHAVEZ: No problem.

11 MS. McCALEB: Thank you.

12 Ms. Pintado, have you been able to find the
13 definition?

14 MS. PINTADO: Yes.

15 MS. McCALEB: Thank you.

16 Could you read that definition for us, please?

17 MS. PINTADO: "A water quality standards
18 variance is a time-limited designated use and criterion
19 for a specific pollutant or water quality parameter that
20 reflect the highest attainable condition during the term
21 of the water quality standards variance."

22 MS. McCALEB: And so that definition indicates
23 that a water quality standards variance applies both to
24 a designated use and a criterion, is that correct?

25 MS. PINTADO: Correct.

1 MS. McCALEB: But in the Department's
2 proposal, at 20.6.4.10.F(3), it states "Designated uses
3 shall not be modified on a temporary basis." Is that
4 correct?

5 MS. PINTADO: That's correct.

6 MS. McCALEB: And so the Department is
7 proposing to leave out the potential temporary change of
8 the designated use and limit it to a potential time-
9 limited change to a criteria, is that correct?

10 MS. PINTADO: No. The Department intends --
11 because the way the federal regulations just finalized
12 reads, you have to identify the highest attainable use
13 and -- with the temporary standard.

14 I believe the language in the Department's
15 proposal makes it clear that designated uses -- the
16 underlying designated uses do not change.

17 MS. McCALEB: So it's the Bureau's position
18 that the underlying designated uses don't change?

19 MS. PINTADO: That's correct.

20 MS. McCALEB: Which comports with EPA's rule,
21 correct?

22 MS. PINTADO: Correct.

23 MS. McCALEB: Is there any particular reason
24 why the Department opposes adopting a definition of a
25 temporary standard that would mimic EPA's definition of

1 a water quality standards variance?

2 MS. PINTADO: No. Unless the procedure is not
3 adopted.

4 MS. McCALEB: Correct. Yes.

5 And, in fact, according to the petition, at
6 page eight, EPA recommended using the term "temporary
7 standard" instead of the term "temporary criteria" to
8 allow the state flexibility and the option to have a
9 temporary use or a temporary criteria. Is that correct?

10 MS. PINTADO: That's correct.

11 MS. McCALEB: And, in fact, the Department
12 changed its proposal and changed its term from
13 "temporary criteria" to "temporary standard." Correct?

14 MS. PINTADO: That's correct.

15 MS. McCALEB: Is it true that any temporary
16 standard approved by this Commission must ultimately be
17 approved by EPA?

18 MS. PINTADO: That is true.

19 MS. McCALEB: And as EPA has made it clear
20 that a water quality standards variance is itself a
21 water quality standard, would you agree that this
22 Commission has the authority to adopt a temporary
23 standard because it is, in effect, a water quality
24 standard?

25 MS. PINTADO: Yes.

1 MS. McCALEB: Okay. Thank you.

2 That's all the questions I have on this topic,
3 Mr. Hearing Officer.

4 MR. CHAVEZ: Thank you.

5 Let's go off the record.

6 (Recess held from 3:10 to 3:28 PM.)

7 MR. DOMINGUEZ: -- if we can prepare to come
8 back.

9 MR. CHAVEZ: All right. We're back on the
10 record in the Matter of New Mexico Water Quality
11 Standards -- sorry about that.

12 We're back on the record in the Matter of WQCC
13 14-05(R).

14 You may continue with your cross.

15 MS. McCALEB: Thank you, Mr. Hearing Officer.

16 And I was remiss before the break. I would
17 like to move admission of the new EPA rule that we were
18 discussing. It's referred to by the Department in their
19 second amended petition, and I just think it would be
20 useful for the Commission, if they needed to refer to
21 the rule, to have it as an exhibit.

22 MR. CHAVEZ: Do we have any objection?

23 MR. SCHLENKER-GOODRICH: I would make a
24 provisional objection, only basically what's good for
25 the goose is good for the gander.

1 As I mentioned before, one of the exhibits
2 that Amigos Bravos submitted yesterday was an EPA
3 guidance document that was directly referenced in
4 testimony from certain parties.

5 So we would not object, but if our guidance
6 document is excluded, then we would hope that that rule
7 would be fairly applied across the board.

8 MR. CHAVEZ: Interesting.

9 The other parties?

10 Chevron.

11 MR. ROSE: No objections, although I note that
12 the Commission probably could take notice of the rule,
13 anyway, without it formally being admitted as an exhibit
14 since it's already public.

15 MR. VERHEUL: The Department has no objection,
16 but we agree with Mr. Rose's comments.

17 MR. CHAVEZ: Los Alamos, any issues?

18 MS. KATZ: No, Mr. Hearing Officer.

19 MR. CHAVEZ: Freeport?

20 MS. CHAPPELLE: No, Mr. Hearing Officer.

21 MR. CHAVEZ: You know what, I'm not going to
22 allow it, because I think once again we already have the
23 issue on record and everybody has access to it.

24 So for the purposes now, I'm not going to
25 allow that.

1 MS. McCALEB: Thank you.

2 May I give a full citation to this document so
3 it's clear in the record which document I was referring
4 to?

5 MR. CHAVEZ: Yes, you may.

6 MS. McCALEB: Thank you.

7 It's 80 Federal Register, Number 162,
8 beginning at page 51020, and it's dated August 21st,
9 2015.

10 MR. CHAVEZ: Thank you.

11 MS. McCALEB: Thank you.

12 MR. CHAVEZ: And for clarification, this
13 document is currently part of NMED's records -- record,
14 or not?

15 MR. DAIL: By reference.

16 MR. CHAVEZ: Because you were -- you were
17 referring to it.

18 MS. PINTADO: The final rule -- I'm not sure,
19 actually. It was referenced --

20 MS. BECKER: It's referenced in your exhibits,
21 right?

22 MS. PINTADO: Yeah. Right.

23 MS. BECKER: Mr. Hearing Officer, for clarity,
24 I believe it's in Ms. Pintado's testimony as a
25 reference, as a citation, but not included as an

1 exhibit.

2 MR. CHAVEZ: That's fine.

3 MS. BECKER: Do you want me to find that page
4 number for you?

5 MR. CHAVEZ: No. That's exactly what we just
6 did for the record. So we're fine.

7 Proceed.

8 MS. McCALEB: Thank you.

9 I believe it's also referenced in the revised
10 petition language submitted in the second amended
11 petition by the Department.

12 MS. PINTADO: That is correct.

13 MR. CHAVEZ: Thank you.

14 You may proceed.

15 MS. McCALEB: Thank you.

16 Ms. Lemon, in your testimony today, and also
17 in the direct testimony of Mr. Hogan that you adopted
18 today, there was a discussion about the need to perform
19 the UAAs to downgrade approximately 30 stream segments
20 that are ephemeral waters because of EPA's record of
21 decision in 2005 which did not approve the Commission's
22 original designation of non-fishable/non-swimmable uses
23 for ephemeral waters. Is that correct?

24 MS. LEMON: Can you restate that?

25 MS. McCALEB: Sure. I'll make that a little

1 easier.

2 MS. LEMON: Yeah.

3 MS. McCALEB: During the 2005 triennial
4 review, the Water Quality Control Commission designated
5 uses for ephemeral waters that included secondary
6 contact and omitted aquatic life. Is that correct?

7 MS. LEMON: That is correct.

8 MS. McCALEB: And according to EPA, those are
9 non-Section 101(a)(2) uses.

10 MS. LEMON: That is correct.

11 MS. McCALEB: So, in other words, they are
12 non-fishable/non-swimmable uses, is that correct?

13 MS. LEMON: Yes.

14 MS. McCALEB: And, therefore, in its record of
15 decision following the 2005 triennial review, the EPA
16 refused to adopt -- or to approve those designations of
17 secondary contact and limited aquatic life; is that
18 correct?

19 MS. LEMON: They took no action.

20 MS. McCALEB: So they refused to approve them
21 -- or they took no action, they certainly didn't approve
22 them, and then during the next triennial review, the
23 Commission, in response, assigned the designated uses of
24 primary contact, and I believe that was warm-water
25 aquatic life. Is that correct?

1 MS. LEMON: To which segments?

2 MS. McCALEB: To the ephemeral streams.

3 MS. LEMON: That's not correct.

4 MS. McCALEB: Okay. Could you --

5 MS. LEMON: Our ephemeral designation in
6 Section 97 has a limited aquatic life use and secondary
7 contact.

8 MS. McCALEB: Okay. I'm sorry. I misspoke on
9 that. If I would follow my notes rather my mind at the
10 moment, I would get it correct.

11 We'll start over again. Thanks.

12 Let me approach it another way. After the
13 2005 triennial review, the EPA, in its record of
14 decision, stated that federal regulations established a
15 rebuttable presumption that fishable/swimmable uses are
16 attainable; is that correct?

17 MS. LEMON: Yes.

18 MS. McCALEB: And, therefore, those uses have
19 to apply to a water body, unless it's demonstrated that
20 those uses are not attainable through a UAA. Is that
21 correct?

22 MS. LEMON: Yes.

23 MS. McCALEB: And that is the purpose for the
24 UAAs that have been done since the last triennial review
25 and the portions of the Bureau's petition during this

1 triennial review to downgrade certain segments to
2 secondary contact and limited aquatic life. Is that
3 correct?

4 MS. LEMON: For the HP UAAs?

5 MS. McCALEB: Yes.

6 MS. LEMON: Correct.

7 MS. McCALEB: And with regard to Mr. Hogan's
8 testimony that you adopted, there is a footnote on page
9 4-22, it's Footnote 1.

10 MS. LEMON: On the direct testimony?

11 MS. McCALEB: On the direct testimony, which
12 was -- I'm sorry, the rebuttal testimony, which is
13 Rebuttal Exhibit 1.

14 MS. BECKER: Do you need the question?

15 MS. LEMON: I don't think there is a question
16 yet.

17 MS. McCALEB: You quote from EPA's -- or
18 Mr. Hogan quoted --

19 MS. LEMON: So which page again?

20 MS. McCALEB: -- on page 4-22 --

21 MS. LEMON: Okay.

22 MS. McCALEB: -- quoted from the EPA record of
23 decision, and there is a footnote to that record of
24 decision, it's Footnote 1. Is that correct?

25 MS. LEMON: Yes.

1 MS. McCALEB: And the URL for that footnote
2 seems to indicate that that was a draft record of
3 decision.

4 Do you see that at the end there, "Review
5 Draft 11/16/06"?

6 MS. LEMON: Yes, I do.

7 MS. McCALEB: Do you know whether the record
8 of decision here that has been quoted on page 4-22 was a
9 draft record of decision and, if so, whether there was a
10 final record of decision?

11 MS. LEMON: I am unsure.

12 MS. McCALEB: Okay. But it was based on this
13 language that's quoted here where EPA disagreed with the
14 Commission's interpretation that the limited aquatic
15 life use was a fishable/swimmable use. Is that correct?

16 MS. LEMON: Yes.

17 MS. McCALEB: Okay. Prior to receiving this
18 record of decision, EPA had previously approved
19 secondary contact and limited aquatic life designated
20 uses without requiring a UAA. Is that correct?

21 MS. LEMON: Prior to this record of decision,
22 yes.

23 MS. McCALEB: And, in fact, during the 2005
24 triennial review, it was even the Bureau's position that
25 the limited aquatic life and secondary contact uses

1 proposed for ephemeral waters were consistent with
2 Section 101(a)(2) uses. Is that correct?

3 MS. LEMON: I'm unsure.

4 MS. McCALEB: I believe if you will look again
5 at 4-22, the first sentence under the heading "Secondary
6 Contact," I believe that sentence sets forth the
7 Bureau's position.

8 MS. LEMON: Yes. It says "The Bureau argued
9 that the limited aquatic life and secondary contact uses
10 proposed for ephemeral waters under Section 97 were
11 consistent with 101(a)(2) uses. However in its review
12 of the 2005 triennial review, the EPA determined these
13 uses are not consistent with 101(a)(2) goals and
14 rejected assigning the ephemeral designation."

15 MS. McCALEB: Was this a new position or a
16 change of position of the EPA at that time?

17 MS. LEMON: I believe it was a change of
18 position. It could be new or a change. I'm unsure.

19 MS. McCALEB: Okay.

20 MS. LEMON: But that is when this rebuttable
21 presumption became clear.

22 MS. McCALEB: Okay. And was this record of
23 decision issued by EPA Region 6 or the EPA
24 administrator? If you know.

25 MS. LEMON: Does it come from the

1 administrator?

2 MS. PINTADO: I don't know.

3 MS. LEMON: We don't know.

4 MS. PINTADO: I don't have that in front of
5 me.

6 MS. McCALEB: After receiving this record of
7 decision from EPA, did the Bureau seek to challenge
8 EPA's new rebuttable presumption?

9 MS. LEMON: We worked with EPA to resolve the
10 issues that were brought up.

11 MS. McCALEB: And what did that work include?
12 How did you resolve the issues?

13 MS. LEMON: We developed a process to
14 establish a way to determine if a water is naturally
15 ephemeral and what the designated uses would be
16 appropriate for those waters. That's the hydrology
17 protocol and the HP UAA process.

18 MS. McCALEB: And so as a result, it's now
19 necessary to use the HP and go through a UAA process in
20 order to show that an ephemeral stream should
21 appropriately have the lower designated use of the
22 secondary contact on limited aquatic life; is that
23 correct?

24 MS. LEMON: That's correct.

25 MS. McCALEB: Those are the only questions I

1 have. Thank you very much.

2 MR. CHAVEZ: Thank you.

3 Let's move now to Amigos Bravos.

4 MR. VERHEUL: Mr. Hearing Officer, if I might
5 interject.

6 MR. CHAVEZ: Yes.

7 MR. VERHEUL: We only have Mr. Patten from the
8 Department of Game & Fish for today. He won't be
9 available tomorrow.

10 So I wonder if you could perhaps check and see
11 if any party has any questions for him before we get to
12 the end of the day.

13 MR. CHAVEZ: Okay. Let's go ahead and do
14 that.

15 Are there other -- between Chevron, Freeport
16 and Los Alamos, will you have any questions for --
17 what's his name?

18 MR. VERHEUL: Mr. Patten.

19 MR. CHAVEZ: -- for Mr. Patten?

20 MS. CHAPPELLE: Freeport does not, Your Honor.

21 MR. CHAVEZ: Okay.

22 MS. KATZ: Los Alamos does not.

23 MR. CHAVEZ: Okay.

24 MR. ROSE: No. No, Mr. Hearing Officer.

25 MR. CHAVEZ: Okay. Are there any Members of

1 the Commission that is going to have any questions for
2 Mr. Patten?

3 MR. DOMINGUEZ: Potentially.

4 MR. CHAVEZ: Any members of the public that
5 are going to have any questions for Mr. Patten?

6 Mr. Chairman and Members of the Commission,
7 your answer of "potentially," if we know what those
8 answers (sic) are, would Amigos have any problem if we
9 took just limited questions for him right now from the
10 Commission, if we know what those questions -- because
11 my concern is this, is given the time, and I know the
12 estimated length of cross by Amigos Bravos, since we
13 need to really be out of here by 5:00, the Commission --
14 we wouldn't get to questions by the Commission until
15 probably first thing in the morning.

16 MS. DeROSE-BAMMAN: I have one.

17 Do you want me to go first?

18 MR. DOMINGUEZ: Go ahead.

19 MR. CHAVEZ: Amigos, do you mind if we ask
20 those questions right now?

21 MR. SCHLENKER-GOODRICH: Absolutely not,
22 Mr. Hearing Officer.

23 MR. CHAVEZ: Does that work for the rest of
24 the parties?

25 MS. BECKER: Thank you.

1 MR. CHAVEZ: Great. Thank you guys.

2 Mr. Chair, Members of the Commission, if we
3 can start questions limited to that witness.

4 Thank you.

5 MS. DeROSE-BAMMAN: Mr. Chair, do you want me
6 to go first?

7 MR. DOMINGUEZ: Yes.

8 MS. DeROSE-BAMMAN: Okay. Thank you. Thank
9 you, Mr. Hearing Officer.

10 CROSS EXAMINATION BY COMMISSION MEMBERS

11 MS. DeROSE-BAMMAN: Mr. Patten, so the changes
12 that were made -- but the changes suggest that we would
13 only -- the hearing would only come to the Commission if
14 your -- if the activities would not be covered under an
15 NPDES permit.

16 So what kind of applications are there where
17 you're not covered by an NPDES permit?

18 MR. PATTEN: I guess, as of right now, because
19 of the way the federal structure is set up, as long as
20 we had an NPDES permit, no applications would come to
21 review by the Commission.

22 MS. DeROSE-BAMMAN: Okay. Thank you.

23 MR. PATTEN: Yeah.

24 MS. DeROSE-BAMMAN: That's all. Believe it or
25 not, that's all.

1 MR. DOMINGUEZ: Okay. We'll just shoot from
2 the hip here.

3 And the same type of deal, part of this might
4 fall towards the Environment Department as well as Game
5 & Fish.

6 The changes on this were based off of the fact
7 that there is a -- has been a general permit issued by
8 EPA for piscicide use on or near water. There have been
9 a number of congressional activities, some still
10 pending, where they are trying to rectify the conflict
11 between Clean Water Act and FIFRA.

12 If that gets rectified, where the general
13 permit goes away, then where does that place these rules
14 or the Commission as far as oversight on piscicides? I
15 refer to them as piscicides.

16 Where would that provide a -- then an issue as
17 far as what our regulations would be, or would that be
18 just a situation where that occurred that it would have
19 to come back and in front of the Commission, or does the
20 current language allow that flexibility to still move
21 forward?

22 MR. PATTEN: I can give the answer a shot, if
23 you guys would like.

24 MS. PINTADO: Sure. Go ahead.

25 MR. PATTEN: The way we set up the proposed

1 amendments was that if there is an NPDES permit, you
2 know, that's covered under the federal rules.

3 If Congress were to act and clear up that, you
4 know, I guess whatever you want to call it, then if we
5 did not have an NPDES permit, because it was no longer
6 required by the Clean Water Act and FIFRA, then we would
7 come back to the Commission, and it would be almost an
8 identical process as it has been in the past.

9 So if we don't have an NPDES permit because
10 Congress acts and deals with that -- once again, that
11 conflict, we would draft a petition, submit it to the
12 Department, submit it to the Commission, it would, you
13 know, have all of the different elements that we've
14 included traditionally.

15 The one difference is right now the hearing is
16 mandatory right now, that the Commission has to go
17 before a hearing officer and all of those things. This
18 would make it discretionary for the Commission. And
19 then I believe we also included some language in the
20 draft amendment that says -- kind of sets up how the
21 Commission can weigh whether or not they want to hold a
22 hearing or not.

23 So it would essentially be a very similar
24 process as it is now.

25 MR. DOMINGUEZ: Okay.

1 MS. PINTADO: I'd agree with that, and also
2 allow for public input before the application is
3 proposed to the Commission, so you have a basis on
4 determining whether a hearing needs to be held or not.

5 MR. DOMINGUEZ: Okay. Very good. Thank you.

6 I was just wanting to make sure we weren't
7 going to get stuck in limbo at some point in time, even
8 though that's purely a hypothetical of it getting there,
9 as there have been some actions.

10 So, Mr. Hearing Officer, that is all I have,
11 but --

12 MR. HUTCHINSON: I guess I would ask, you
13 know, concerning these piscicides, isn't there ongoing
14 and current litigation concerning these piscicides in
15 other jurisdictions?

16 MR. PATTEN: I'm trying to think through all
17 of the -- the jurisdictions I'm familiar with, and I'm
18 not aware of any that are ongoing right now.

19 There has been litigation in California.
20 There has been litigation in Montana. I believe both of
21 those cases were resolved some years ago. So I'm not
22 aware of any, no.

23 MR. HUTCHINSON: Okay. Thank you.

24 MR. PATTISON: Mr. Chairman.

25 MR. DOMINGUEZ: Mr. Pattison.

1 MR. PATTISON: Yes, Mr. Hearing Officer.

2 Mr. Patten, under these proposals, do the
3 activities of your agency have anything to do with playa
4 lakes?

5 MR. PATTEN: Generally speaking, no. And the
6 reason I say "generally" is someone mentioned McAllister
7 Lake earlier, and that is a water that we used to manage
8 as a sport fishery, and it is technically a playa
9 lake --

10 MR. PATTISON: Okay.

11 MR. PATTEN: -- but, generally speaking,
12 because playa lakes are, you know, dry at one point and
13 wet at another point, there is not much of a fishery
14 involved and a need to use a piscicide in that case. It
15 would not be foreseeable.

16 So, no, I don't believe so.

17 MR. PATTISON: Thank you.

18 MR. CHAVEZ: Mr. Chair, Members of the
19 Commission, any further questions for Mr. Patten?

20 MR. DOMINGUEZ: I think that's it from the
21 Commission.

22 We appreciate the parties' indulgence in
23 letting us run out of order there, but in order to work
24 in the witness.

25 MR. CHAVEZ: Thank you.

1 MR. DOMINGUEZ: Back to you, Mr. Hearing
2 Officer.

3 MR. VERHEUL: We would ask that that witness
4 be excused at this time then, Mr. Hearing Officer.

5 MR. CHAVEZ: Amigos Bravos, do you have any
6 questions for Mr. Patten?

7 MR. SCHLENKER-GOODRICH: No, we do not.

8 MR. CHAVEZ: Mr. Patten, you are excused.

9 MR. PATTEN: Thank you.

10 MR. CHAVEZ: You may proceed.

11 MR. SCHLENKER-GOODRICH: Mr. Chair --
12 Mr. Chairman, Mr. Hearing Officer, Commissioners, good
13 afternoon. Witnesses, good afternoon. Good afternoon,
14 counsel.

15 Let me begin by extending Amigos Bravos'
16 appreciation to the Department for working through some
17 of the issues that we had regarding the piscicide
18 applications as well as the segment 128 issues. We do
19 appreciate that work, and it does clear the deck a
20 little bit for this triennial review. So thank you.

21 CROSS EXAMINATION BY MR. SCHLENKER-GOODRICH

22 MR. SCHLENKER-GOODRICH: Most of my
23 cross-examination will, I think, be directed to
24 Ms. Pintado, and I'm going to begin with temporary
25 standards and the Department's proposal for them.

1 MS. PINTADO: Okay.

2 MR. SCHLENKER-GOODRICH: While crafted as a
3 temporary standard, the Department's proposal would be
4 reviewed by EPA as effectively a variance. Is that
5 right?

6 MS. PINTADO: It would be viewed by EPA as a
7 variance -- a water quality standards variance.

8 MR. SCHLENKER-GOODRICH: A water quality.

9 And that's basically because of some tension
10 between how EPA defines a variance versus how New
11 Mexico, under New Mexico law, defines variance. Is that
12 right?

13 MS. PINTADO: Correct.

14 MR. SCHLENKER-GOODRICH: Is it the
15 Department's position that its temporary standards
16 proposal is consistent with EPA rules and guidance
17 dealing with variances?

18 MS. PINTADO: Yes.

19 MR. SCHLENKER-GOODRICH: On page four of your
20 direct testimony, and I'll -- well, I can quote from it
21 or allow you time to turn to it -- you state that "The
22 need for a temporary standard is apparent in the state's
23 application of the general narrative nutrient criteria
24 in Subsection E of 20.6.4.13 NMAC." Page four of your
25 direct testimony.

1 MS. PINTADO: Sorry.

2 MR. SCHLENKER-GOODRICH: I must have the wrong
3 page number on there. I apologize.

4 In your direct testimony, do you remember
5 providing information that the -- one of the driving
6 forces behind the temporary standard was the general
7 nutrient criteria?

8 MS. PINTADO: That's correct.

9 MR. SCHLENKER-GOODRICH: How long has the
10 general nutrient criteria been in place?

11 MS. PINTADO: I really don't know.

12 The general criteria has been in place for --
13 it would be in the end notes of the standards, but --

14 MR. DOMINGUEZ: Could you speak up, please?

15 MS. PINTADO: I'm sorry for not being able to
16 speak up.

17 I don't know.

18 MR. SCHLENKER-GOODRICH: Do you have any sense
19 of more than five years, less than five years?

20 MS. PINTADO: More than five years.

21 MR. SCHLENKER-GOODRICH: Did regulated
22 entities or the Department attempt action through, for
23 example, compliance schedules or other mechanisms to
24 make progress towards the general nutrient criteria?

25 MS. PINTADO: I can't answer that question.

1 Maybe someone here on the panel can.

2 MR. SCHLENKER-GOODRICH: Maybe I'll direct
3 that question to Ms. Lemon.

4 Ms. Lemon, did -- did the regulated entities
5 or Department attempt action before submitting the
6 temporary standards proposal to make progress towards
7 the general nutrient criteria through, for example,
8 compliance schedules or other mechanisms?

9 MS. LEMON: We have worked with the permitted
10 entities that the narrative -- that are assigned the
11 narrative permit limitations.

12 The problem is that we don't have permitting
13 authority. We've been working with EPA to try to
14 resolve some of the issues, but our translators are
15 technologically not feasible for wastewater treatment
16 plants, and that's where the problem -- that's where the
17 problem stems from.

18 And we have talked to EPA Region 6 about
19 compliance schedules and other ways of achieving the
20 same goal, which is to achieve the water quality
21 standard in the stream. The problem there also is that
22 a permit is only for five years, so it may take longer
23 than five years for the technology to come into play,
24 and if it is economically feasible for the community
25 where it's existing.

1 MR. SCHLENKER-GOODRICH: Is there a limitation
2 in the Department's proposal providing that a temporary
3 standard would only be applicable if a compliance
4 schedule would not work with a permit?

5 MS. PINTADO: No.

6 MR. SCHLENKER-GOODRICH: You mentioned,
7 Ms. Lemon, that you had discussions with EPA on this
8 front.

9 What was EPA's response in terms of the use of
10 compliance schedules and/or other mechanisms to comply
11 with the general nutrient criteria?

12 MS. LEMON: Their general approach is to have
13 a three-year -- no more than three-year compliance
14 schedule, and they are starting -- headquarters and the
15 region are starting to recognize that that may not be
16 feasible in all situations, but they are still not
17 really implementing any compliance schedules longer than
18 three years.

19 MR. SCHLENKER-GOODRICH: Before a petitioner
20 submits a temporary standard proposal, would the
21 Department encourage the petitioner, or if the
22 Department itself was the petitioner, would the
23 Department first look to compliance schedules to see
24 whether you could come into compliance with the general
25 nutrient criteria before the sunset of that five years

1 for the permit -- of the NPDES permit?

2 MS. LEMON: I would anticipate that the
3 temporary standard would be the last consideration.

4 MR. SCHLENKER-GOODRICH: But again, and I
5 think I asked this, but just to be clear, there is no
6 provision in the temporary standards proposal requiring
7 you to first look at a compliance schedule to see if
8 that is an appropriate vehicle and then say, "Well, it
9 won't work in this situation because it may take beyond
10 five years, so we need to do a temporary standard
11 instead"? There is no requirement to make that happen?

12 MS. LEMON: We do have a section in our
13 standards that speaks to compliance schedules.

14 Kris --

15 MS. PINTADO: Yes.

16 MR. SCHLENKER-GOODRICH: Could you point to
17 that section or generally identify that?

18 MS. PINTADO: H -- 12.H.

19 MS. LEMON: 12.

20 MR. SCHLENKER-GOODRICH: As I understand it,
21 12.H only refers to incorporation of a temporary
22 standard into the permitting process. It doesn't --

23 MS. PINTADO: Right. Sorry.

24 MR. SCHLENKER-GOODRICH: -- talk about
25 compliance schedules, is that right?

1 MS. PINTADO: G would be compliance schedules,
2 correct.

3 MR. SCHLENKER-GOODRICH: So, Ms. Pintado, is
4 there a provision in G regarding compliance schedules?
5 I'm sorry, not in G, in F -- in Subsection F.

6 MS. PINTADO: No.

7 MR. SCHLENKER-GOODRICH: Thank you.

8 Can you provide any additional examples beyond
9 the general nutrient criteria of where additional
10 flexibility is required necessitating the use of
11 temporary standards?

12 MS. PINTADO: In the case where the state must
13 adopt a more stringent water quality criteria or a new
14 water quality standard, and it becomes more stringent,
15 and the technology to treat for that particular
16 pollutant may not be technologically achievable or
17 feasible.

18 MR. SCHLENKER-GOODRICH: Do you have any --
19 understood that that's the component of how that -- how
20 the temporary standard works.

21 Do you have any concrete examples, other
22 criteria, other than the general nutrient criteria?

23 MS. PINTADO: There are at this time
24 recommendations to upgrade the ammonia criteria,
25 selenium, and all of the human health criteria may be

1 updated.

2 So we'll be looking at those over the course
3 of the next three years.

4 MR. SCHLENKER-GOODRICH: What is the timeline
5 for the update to those provisions?

6 MS. PINTADO: We will review the
7 recommendations and determine whether we need to adopt
8 or change our criteria for the next triennial.

9 MR. SCHLENKER-GOODRICH: As I understand it,
10 the Department's temporary standards proposal would
11 apply to all discharges of a specific pollutant or
12 parameter -- or impact on a parameter into a specific
13 water body segment. Correct?

14 MS. PINTADO: The temporary standard applies
15 to the water body as described by the petitioner.

16 MR. SCHLENKER-GOODRICH: And so say in a
17 particular water body segment you had five discharges.
18 Would all of those use the temporary standard or rely on
19 this temporary standard?

20 MS. PINTADO: Yes.

21 MR. SCHLENKER-GOODRICH: How are multiple
22 discharges into a water body segment proposed for a
23 temporary standard accounted for in the petition?

24 MS. PINTADO: They are not -- to be clear, the
25 temporary standard does not change any permit

1 regulations and the anti-deg requirements or permit
2 review or permitting policies.

3 A temporary standard is aimed at the temporary
4 water quality standard to be implemented in an NPDES
5 permit.

6 MR. SCHLENKER-GOODRICH: Nonetheless, the
7 provision in F(5) does provide for the preparation of a
8 work plan by the petitioner.

9 MS. PINTADO: Yes.

10 MR. SCHLENKER-GOODRICH: Would the work plan
11 identify and account for those multiple discharge
12 points?

13 MS. BECKER: Objection.

14 Mr. Hearing Officer, I believe that the
15 questions are directed to the exhibits that were
16 attached by Amigos Bravos.

17 I don't believe they are language that's
18 included in the petition that was the subject of
19 Ms. Pintado's testimony regarding multiple discharges.

20 MR. SCHLENKER-GOODRICH: I'm not sure how
21 relevant that is. I mean, I'm entitled to cross-examine
22 the Department on the structure of the proposal. This
23 -- while it does relate to some of the proposals that
24 we've made, in terms of understanding or improving the
25 standard, I think, as an attorney, I'm still entitled to

1 cross-examine on the structure of the rule and what it
2 would apply to or not apply to.

3 MR. CHAVEZ: Last word.

4 MS. BECKER: Mr. Hearing Officer, I would
5 recommend -- my understanding is that if he's going to
6 introduce new topics for discussion that he would do
7 that on rebuttal and we'd be prepared to address that on
8 rebuttal.

9 MR. SCHLENKER-GOODRICH: I would only say
10 that I'm asking a direct question regarding the
11 structure of the proposal that's been advanced in direct
12 testimony.

13 MR. CHAVEZ: I'm going to go ahead and allow
14 it.

15 MR. SCHLENKER-GOODRICH: So the work plan
16 section in F(5), it -- how does it account for multiple
17 discharge points into that particular water body
18 segment?

19 MS. PINTADO: The work plan itself is not
20 required to account for those.

21 MR. SCHLENKER-GOODRICH: If it's not required
22 to account for multiple discharge points -- I'm
23 referring to page 21 -- if you could turn to page 21 of
24 your direct testimony.

25 You mention that the temporary standard

1 requires compliance with the original standard as soon
2 as possible. Is that correct?

3 MS. PINTADO: Yes.

4 MR. SCHLENKER-GOODRICH: If the work plan does
5 not account for -- identify or account for the multiple
6 discharge points, how does the work plan actually ensure
7 that compliance with the original standard is made as
8 soon as possible?

9 MS. PINTADO: The petitioner must comply with
10 the temporary standard.

11 If there are multiple dischargers to that
12 water body, EPA requires that they be identified in the
13 submission for the temporary standard.

14 MR. SCHLENKER-GOODRICH: I'm sorry, could you
15 say that last part again, that if --

16 MS. PINTADO: Sure.

17 EPA requires that the -- let me read the
18 language for you. Supporting documentation -- right.

19 Would you ask the question again? I'm sorry.
20 I lost myself in the regs.

21 MR. SCHLENKER-GOODRICH: How does the
22 temporary standard achieve the original standard as soon
23 as possible where you have multiple dischargers within
24 that water body segment?

25 MS. PINTADO: All of the dischargers to that

1 water body segment would have to meet the underlying
2 criteria for that pollutant. They have to adhere to the
3 temporary standard just as the petitioner would.

4 MR. SCHLENKER-GOODRICH: As I understand it,
5 in order to justify the temporary standard, the
6 proponent needs to submit a work plan pursuant to
7 Subsection F(5). Is that correct?

8 MS. PINTADO: Correct.

9 MR. SCHLENKER-GOODRICH: And that the work
10 plan, and reading from the language, requires a timeline
11 for proposed actions to be taken to achieve the uses
12 attainable over the term of the temporary standard. Is
13 that right?

14 MS. PINTADO: Right.

15 MR. SCHLENKER-GOODRICH: What would those
16 proposed actions look like if the work plan is not
17 identified and accounting for the multiple discharge
18 points?

19 MS. PINTADO: It would include baseline
20 monitoring. It would include projects needed to improve
21 the plant for treatment. It could -- those would be the
22 types of things we would anticipate in the plan.

23 MR. SCHLENKER-GOODRICH: So if it was projects
24 for a particular facility, wouldn't you have to identify
25 that facility in the first place in the work plan to

1 determine whether the temporary standard would, in fact,
2 achieve the original standard within the lifetime of the
3 temporary standard?

4 MS. PINTADO: The petitioner would identify
5 their -- within their purview.

6 MR. SCHLENKER-GOODRICH: So the facility who
7 submits the petition would submit a work plan
8 identifying what actions they would take?

9 MS. PINTADO: The petitioner would submit a
10 work plan identifying those actions.

11 MR. SCHLENKER-GOODRICH: And let's go back to
12 the hypothetical, if you had five discharge points, say
13 you have five facilities in that segment, a single
14 facility could seek a temporary standard, prepare a work
15 plan about how they are going to comply with the
16 temporary standard to justify it, but the other four
17 facilities would not have to submit a work plan?

18 MS. PINTADO: All of them would have to adhere
19 to the temporary standard as a water quality standard
20 and the limits and conditions in that temporary
21 standard.

22 MR. SCHLENKER-GOODRICH: Understood.

23 But in that hypothetical, the four other
24 dischargers would not have to submit a work plan, only
25 the original petitioner would have to?

1 MS. PINTADO: Correct.

2 MR. SCHLENKER-GOODRICH: Thank you.

3 Going back to your testimony on page 21, where
4 you mentioned that the original standard must be, quote,
5 unquote, achieved as soon as possible, and that the
6 temporary standard is limited to, quote, unquote, the
7 minimum time necessary -- I'll give you a chance to turn
8 back to page 21.

9 Can you pinpoint for me where this timing
10 constraint on the lifetime of the temporary standard is
11 found in the proposed language in Subsection F?

12 MS. PINTADO: It is not.

13 MR. SCHLENKER-GOODRICH: Is there a reason for
14 that omission?

15 MS. PINTADO: The proposal -- if you don't
16 mind, I'm going to refer to it.

17 MR. SCHLENKER-GOODRICH: And I would note that
18 your testimony has in quotes "minimum time necessary,"
19 but the provision, and specifically in F(1)(b) --

20 MS. PINTADO: Right.

21 MR. SCHLENKER-GOODRICH: -- simply states
22 "minimum necessary" and excludes "time."

23 MS. PINTADO: That's correct.

24 The temporary standard should be tailored to
25 the time necessary to achieve the underlying standard.

1 It may depend on the complexity of meeting or achieving
2 that standard.

3 MR. SCHLENKER-GOODRICH: Understood. But that
4 wasn't my question.

5 My question was, why was that time --
6 specifically that word "time," was it omitted
7 intentionally or unintentionally in Subsection F(1)(b)?
8 Why doesn't it have a clear temporal component, I guess,
9 is my question?

10 MS. PINTADO: Well, it was recommended by EPA
11 at the time the clarifications rule was being finalized.
12 There was discussed a time limit for water quality
13 standards variances.

14 The EPA advised us to consider the flexibility
15 of not incorporating a definite time frame, especially
16 to accommodate restoration projects or remediation
17 projects that may require more time to achieve the
18 underlying criteria or standard.

19 MR. SCHLENKER-GOODRICH: Would the Department
20 be amenable to including a general time component, so
21 inclusion of that word "time" between "minimum" and
22 "necessary"?

23 MS. PINTADO: No.

24 MR. SCHLENKER-GOODRICH: Is there -- well,
25 never mind.

1 Regarding the work plan proposed for Section
2 -- Subsection F(5) --

3 MS. PINTADO: Yes.

4 MR. SCHLENKER-GOODRICH: -- will the
5 Commission specifically approve the work plan?

6 MS. PINTADO: The Commission will approve the
7 work plan with the petition for the temporary standard,
8 yes.

9 MR. SCHLENKER-GOODRICH: So to be clear, they
10 would be approving not just the temporary standard but
11 the specific work plan submitted to justify that
12 temporary standard?

13 MS. PINTADO: Correct.

14 MR. SCHLENKER-GOODRICH: Can you point out
15 specifically where in Subsection F it provides that the
16 Commission will approve the work plan --

17 MS. PINTADO: The Commission --

18 MR. SCHLENKER-GOODRICH: -- not just the
19 temporary standard component?

20 MS. PINTADO: Right.

21 I don't believe that's specified.

22 I'm sorry. Excuse me. That's true.

23 Ms. Lemon is pointing out to me "As a
24 condition of the petition for a temporary standard, in
25 addition to meeting the requirements in this subsection,

1 the petitioner shall prepare a work plan in accordance
2 with paragraph" --

3 MS. LEMON: 4.

4 MS. PINTADO: -- "4" --

5 MR. SCHLENKER-GOODRICH: 4.

6 MS. PINTADO: -- "and submit the work plan to
7 the Department for review and comment."

8 MR. SCHLENKER-GOODRICH: That doesn't include,
9 though, "and to the Commission for approval," does it?

10 MS. PINTADO: The work plan and the petition
11 are submitted together.

12 MR. SCHLENKER-GOODRICH: But there is no
13 language in Subsection F, or in proposed Subsection H,
14 that explicitly provides for Commission approval of that
15 work plan, only the temporary standard itself?

16 MS. PINTADO: The work plan as part of the
17 temporary standard, correct.

18 MR. SCHLENKER-GOODRICH: The proposed text in
19 Subsection F(7) states that "Temporary standards may be
20 implemented only after appropriate public
21 participation."

22 What does this mean?

23 MS. PINTADO: At the beginning of Section
24 F(1), in paragraph F(1), "Any person may petition the
25 Commission to adopt a temporary standard."

1 So the implication is that temporary standard
2 would be adopted, as any other water quality standard,
3 and implemented after appropriate public participation,
4 as required by our rule-making procedure.

5 MR. SCHLENKER-GOODRICH: So to be clear,
6 you're not suggesting that the temporary standard could
7 be approved, and then before that approved standard is
8 implemented, you would go through the public
9 participation? It would occur before it's actually
10 approved?

11 MS. PINTADO: Correct.

12 MR. SCHLENKER-GOODRICH: Will the public be
13 involved in the development of a temporary standards
14 proposal before it is submitted to the Commission?

15 MS. PINTADO: That petitioner may include
16 public participation is required in paragraph -- yes,
17 paragraph 5, public notice and consultation, review of
18 -- oh, that's review of progress.

19 The public notice and consultation with
20 appropriate state, tribal, local and federal agencies is
21 outlined in that paragraph.

22 MR. SCHLENKER-GOODRICH: So there is a notice
23 provision, but does that encompass actual participation
24 by the public, so that they would get to review, for
25 example, a draft work plan that's submitted to the

1 Department?

2 MS. PINTADO: The water quality management
3 plan requires, for rule-making process, that we include
4 public participation. We would expect to see a draft
5 notice put out for discussion and comment, yes.

6 MR. SCHLENKER-GOODRICH: So, for example, for
7 Subsection F(5), the work plan that's submitted to the
8 Department for review and comment, that would also be
9 available to the public for review and comment?

10 MS. PINTADO: Yes.

11 MR. SCHLENKER-GOODRICH: But to be clear,
12 Subsection F(5) doesn't include that as an explicit
13 requirement?

14 MS. PINTADO: No.

15 MR. SCHLENKER-GOODRICH: Does the Commission
16 have to hold a public hearing on the temporary standards
17 proposal?

18 MS. PINTADO: Yes.

19 MR. SCHLENKER-GOODRICH: Switching gears a
20 little bit.

21 NMED's proposed language for Subsection H
22 would incorporate the temporary standard into 402 NPDES
23 permits as enforceable limits and conditions, correct?

24 MS. PINTADO: Correct.

25 MR. SCHLENKER-GOODRICH: Once a temporary

1 standard is approved, this means that effluent limits in
2 that permit would be crafted on the basis of the
3 temporary standard, correct?

4 MS. PINTADO: For the interim period, correct.

5 MR. SCHLENKER-GOODRICH: Could this result in
6 weaker effluent limits in a renewed 402 permit compared
7 to the prior 402 permit?

8 MS. PINTADO: Yes.

9 MR. SCHLENKER-GOODRICH: Could weaker effluent
10 limits in a renewed 402 permit result in increased
11 concentrations of discharges into the receiving water?

12 MS. PINTADO: For a limited period of time, it
13 may.

14 MR. SCHLENKER-GOODRICH: Over the lifetime of
15 the temporary standard?

16 MS. PINTADO: Over the lifetime of the
17 temporary standard, we would expect to see that, first
18 of all, the water quality is absolutely maintained, and
19 what is achievable at that time is maintained, but the
20 pollutant in question should be reducing over that
21 period of the temporary standard.

22 MR. SCHLENKER-GOODRICH: So there is sort of a
23 downward slope towards compliance with the original
24 standard?

25 MS. PINTADO: Correct.

1 MR. SCHLENKER-GOODRICH: But at the beginning
2 of the slope, you could have increased concentrations
3 because of the weaker effluent limits compared to the
4 prior permit that existed in the absence of the
5 temporary standard?

6 MS. PINTADO: Compared to the prior permit,
7 yes.

8 MR. SCHLENKER-GOODRICH: How does a temporary
9 standard account for any new or increased discharges
10 into the water body segment the standard will cover,
11 say a new facility or an expansion of an existing
12 facility?

13 MS. PINTADO: The temporary standard is still
14 subject to the same permit reviews, rules and
15 regulations, including anti-degradation, as any other
16 water quality standard or permit.

17 MR. SCHLENKER-GOODRICH: So I guess you
18 answered this earlier, but just to be clear, if you have
19 -- if there was a new or increased discharge, the entity
20 seeking a permit would not have to prepare a work plan
21 that -- per Subsection F(5); they would simply have to
22 comply with the temporary standard proposal?

23 MS. PINTADO: Yes.

24 MR. SCHLENKER-GOODRICH: What would happen if
25 the Commission, in accord with Subsection F(6), imposes

1 conditions on the approval of a temporary standard that
2 go to that work plan?

3 Would the new or increased discharger have to
4 also comply with those actions?

5 MS. PINTADO: Yes.

6 MR. SCHLENKER-GOODRICH: How does the
7 temporary standard proposal account for these new or
8 increased discharges, since the premise seems to be that
9 it is approved when there is -- there are assurances
10 that the original standard will be achieved?

11 If you have a new or increased discharge,
12 would you clarify how do you ensure that once that new
13 or increased discharge is in that water body segment
14 you're still on track to achieve the original standard
15 by the end of the life of the temporary standard?

16 MS. PINTADO: Well, the underlying criterion
17 standards are still the end game. Those new and -- or
18 increased dischargers would be subject to anti-deg.

19 MR. SCHLENKER-GOODRICH: So the temporary
20 standard does -- it doesn't alter New Mexico's
21 anti-degradation policy and implementation plan?

22 MS. PINTADO: No.

23 MR. SCHLENKER-GOODRICH: Are there
24 distinctions in whether and how a temporary standard
25 applies relative to each anti-degradation tier?

1 MS. PINTADO: Could you rephrase that, please?

2 MR. SCHLENKER-GOODRICH: Are there -- if you
3 have a temporary standard for a Tier 1 water, is that
4 different from a Tier 2 -- how it would apply to a Tier
5 2 or 3 water?

6 MS. PINTADO: For new or increased -- and
7 increased dischargers or for anybody?

8 MR. SCHLENKER-GOODRICH: For any discharge.

9 MS. PINTADO: There is no difference.

10 MR. SCHLENKER-GOODRICH: There is no
11 difference.

12 MS. PINTADO: It would still apply. Right.

13 MR. SCHLENKER-GOODRICH: Would the proponent
14 of a temporary standard have to demonstrate compliance
15 with the anti-degradation provision before the temporary
16 standard is approved or after?

17 MS. PINTADO: It would be part of the permit
18 review process.

19 MR. SCHLENKER-GOODRICH: So after the
20 temporary standard is approved?

21 MS. PINTADO: Correct.

22 MR. SCHLENKER-GOODRICH: Turning to Section H
23 -- 12.H, this provision seems to encompass only Clean
24 Water Act 402 permits, not 404, dredge and fill permits.
25 I'm curious if you could explain why.

1 MS. PINTADO: Because of the way the
2 regulations were finalized in the federal rule, they
3 made it very clear they were aimed at the NPDES permit.
4 They also made it clear you can incorporate 402. But,
5 you know, obviously, it would be federal permits that
6 we're talking about under 401, 402, so --

7 MR. SCHLENKER-GOODRICH: Would the -- so you
8 mentioned 401 and 402, but would the provisions of the
9 temporary standard -- my understanding of Subsection H
10 is that this is to make sure that the provisions of
11 the temporary standard become enforceable within the
12 permit.

13 MS. PINTADO: That's correct. That's correct.

14 MR. SCHLENKER-GOODRICH: And so would they
15 also be enforceable for a 404 permit?

16 MS. PINTADO: Yes.

17 MR. SCHLENKER-GOODRICH: Is there a reason,
18 then, that Subsection H excludes reference to 404 and
19 only references 402 NPDES permits?

20 MS. PINTADO: No.

21 MR. SCHLENKER-GOODRICH: Would the Department
22 be amenable to changing that to encompass both 402 and
23 404 permits?

24 MS. PINTADO: Yes.

25 MR. SCHLENKER-GOODRICH: Thank you.

1 I'd like to switch to the aluminum criteria in
2 the Department's proposal. These questions specifically
3 pivot off the Department's proposal for Section
4 900.I(1). It's a provision -- I'm paraphrasing a bit --
5 that EPA has disapproved use of a hardness-based
6 equation for total recoverable aluminum in waters where
7 the pH is less than 6.5 in the receiving stream for
8 federal Clean Water Act purposes.

9 Ms. Pintado, EPA's disapproval was included as
10 Attachment A to the Department's October 20th, 2014,
11 amended petition. Correct?

12 MS. PINTADO: Correct.

13 MR. SCHLENKER-GOODRICH: What was the basis of
14 EPA's disapproval?

15 MS. PINTADO: Actually, it wasn't very clear.

16 MR. SCHLENKER-GOODRICH: Can you strive to
17 make a guess at what you --

18 MS. PINTADO: I will.

19 They felt that the hardness-based formula
20 would be protective for pH -- for waters of pH over 6.5.

21 MR. SCHLENKER-GOODRICH: But not protective of
22 waters under a pH of 6.5, is that correct?

23 MS. PINTADO: Correct.

24 MR. SCHLENKER-GOODRICH: Assuming that the
25 Department's proposal for Subsection I(1) is adopted,

1 what would the criteria for aluminum be in waters where
2 the pH is less than 6.5?

3 MS. PINTADO: EPA would apply the 87 microgram
4 per liter chronic criteria.

5 MR. SCHLENKER-GOODRICH: What would be the
6 aluminum standard for state Water Quality Act purposes
7 in a water that's not subject to federal Clean Water Act
8 permitting?

9 MS. PINTADO: Not subject to Clean Water Act
10 permitting?

11 MR. SCHLENKER-GOODRICH: A water of the state,
12 not a water of the US.

13 MS. PINTADO: A water of the state.
14 We would use the hardness based.

15 MR. SCHLENKER-GOODRICH: Does EPA's rejection
16 for federal Clean Water Act purposes of hardness-based
17 aluminum criteria in waters where the pH is less than
18 6.5 raise concerns that the hardness-based criteria may
19 not be sufficiently protective of aquatic species for
20 state Water Quality Act purposes also in waters where
21 the pH is less than 6.5?

22 MS. PINTADO: They had no basis for assigning
23 the 87, other than reverting to the old criteria, but --

24 MR. SCHLENKER-GOODRICH: But they nonetheless
25 determined that the hardness-based criteria was not

1 protective of aquatic uses for federal Clean Water Act
2 purposes in waters with a pH of less than 6.5?

3 MS. PINTADO: Correct.

4 MR. SCHLENKER-GOODRICH: And it's the
5 Department's position that there aren't any concerns
6 regarding waters of the state where the pH is less than
7 6.5?

8 MR. DAIL: There is a huge concern, because pH
9 -- waters with a pH less than 6.5 would already be
10 impaired and therefore on the 303(d) list.

11 Under those circumstances, a lot of metals
12 would be in a dissolved and thus potentially
13 bioavailable form, but it's the underlying problem with
14 pH that may be of concern for remedy.

15 However, some of the waters that are in those
16 low pHs just happen to be natural and a function of
17 geologic -- geologic interface between water and the
18 surrounding geology that drives it.

19 So you can have a natural low pH under those
20 circumstances.

21 MR. SCHLENKER-GOODRICH: So even in waters
22 where it seems that the pH problem is a little bit
23 independent of the aluminum toxicity issue to aquatics,
24 in your view, doesn't that intensify the need to control
25 aluminum discharges into that water body, because that

1 could exacerbate impacts to aquatic species, even given
2 the natural background pH issues?

3 MR. DAIL: No, I don't think you're going to
4 be able to remedy the problem with aluminum without
5 tackling the problem with pH, but I don't it's -- it's
6 warranted to try to tackle a natural pH.

7 MR. SCHLENKER-GOODRICH: Do you think it's not
8 warranted to also tackle the aluminum problem at the
9 same time?

10 MR. DAIL: I think, since the solubility of
11 aluminum, and thus the toxicity at low pH, is related to
12 the pH, by resolving one, if indeed it is an unnatural
13 or manmade reduction in pH, you are resolving the other.

14 MR. SCHLENKER-GOODRICH: But pending
15 resolution of that, you are nonetheless allowing the
16 hardness-based aluminum criteria that EPA found was not
17 protective of aquatic uses in those waters?

18 MR. DAIL: Well, these are hypotheticals.

19 In water quality measurements, we may indeed
20 be measuring a lot of metals and below a pH of 6.5, and
21 the hardness-based criteria for all of those metals may
22 indicate impairment.

23 MR. SCHLENKER-GOODRICH: Ms. Pintado, you
24 mentioned that there was ambiguity or you didn't quite
25 understand EPA's rationale for disapproving the

1 hardness-based criteria for federal Clean Water Act
2 purposes.

3 And specifically on 84 of your direct
4 testimony -- I'll let you turn to that -- you state that
5 EPA's letter, which was Attachment A, was not well
6 justified and ambiguous about what criteria should apply
7 in low pH waters.

8 Is that correct?

9 MS. PINTADO: Correct.

10 MR. SCHLENKER-GOODRICH: What's the basis of
11 this characterization?

12 MS. PINTADO: Well, they would apply the 87
13 chronic whether it were under acute or chronic
14 conditions first.

15 Second, it does not acknowledge the footnote
16 in the original 1988 criteria document, and we tried to
17 remedy the problem by putting the 88 criteria into the
18 table. EPA said this would not fix the problem. That's
19 when it became very clear that they wouldn't -- they
20 were intending to adopt or use 87, the chronic, with no
21 basis.

22 MR. SCHLENKER-GOODRICH: Shouldn't that
23 omission be referring only to the 87, it should be
24 understood in context of EPA's role as a permitting
25 authority where they typically reference chronic

1 criteria as the most protective of water quality?

2 MS. PINTADO: I'm not sure.

3 MR. SCHLENKER-GOODRICH: EPA did state -- I'm
4 referring to Attachment A again, on page two -- that,
5 quote, unquote, "The previously approved 304(a) criteria
6 for aluminum are thus the applicable water quality
7 standards for purposes of the Clean Water Act."
8 Correct?

9 MS. PINTADO: Correct.

10 MR. SCHLENKER-GOODRICH: And that encompasses
11 both the aquatic criteria of 87 micrograms per liter and
12 the acute criterion of 750 micrograms per liter,
13 correct?

14 MS. PINTADO: Correct.

15 MR. SCHLENKER-GOODRICH: EPA also provided a
16 letter dated December 4th, 2013, attached as Department
17 Exhibit 5 to your notice of intent, regarding
18 recommended language for aluminum criteria.

19 Let me get to that.

20 MS. PINTADO: Exhibit which?

21 MR. SCHLENKER-GOODRICH: Exhibit 5. If you'd
22 go to -- I believe it's page eight, at the bottom --

23 MS. PINTADO: Yes.

24 MR. SCHLENKER-GOODRICH: -- for aluminum.

25 MS. PINTADO: Uh-huh.

1 MR. SCHLENKER-GOODRICH: And EPA says "To
2 resolve this disapproval, EPA again recommends that the
3 State adopt language specific to this equation
4 specifying the following," and I highlighted it, and I
5 can't -- "Where pH is equal to or greater than 6.5 in
6 the receiving water after mixing, the chronic hardness-
7 dependent equation will apply. Where pH is 6.5 or less
8 in the receiving water after mixing, either the 87
9 micrograms per liter chronic total recoverable aluminum
10 criterion or the criterion resulting from the chronic
11 hardness-dependent equation will apply, whichever is
12 more stringent."

13 Is that correct?

14 MS. PINTADO: Correct.

15 MR. SCHLENKER-GOODRICH: Did the Department
16 consider inclusion of this language?

17 MS. PINTADO: Yes.

18 MR. SCHLENKER-GOODRICH: And the Department
19 presumably rejected it?

20 MS. PINTADO: Yes.

21 MR. SCHLENKER-GOODRICH: And what was the
22 basis for that rejection?

23 MS. PINTADO: EPA will apply the aluminum
24 criteria as they recommend. I don't feel -- I don't
25 think the state is obligated to adopt the exact

1 language.

2 MR. SCHLENKER-GOODRICH: Has the Department
3 conferred with the EPA in an attempt to resolve the
4 ambiguities resolving what aluminum criteria --

5 MS. PINTADO: Yes.

6 MR. SCHLENKER-GOODRICH: -- must apply?

7 MS. PINTADO: Yes.

8 MR. SCHLENKER-GOODRICH: And what were the
9 results of those conversations, beyond the -- and I
10 understand that there are letters attached to the
11 exhibits. But were there other conversations that led
12 to some pathway to clarify this?

13 MS. PINTADO: Well, we understand that the
14 aluminum criteria are in the process of being -- new
15 304(a) recommendations are in the process of being
16 developed for aluminum.

17 MR. SCHLENKER-GOODRICH: By not specifying
18 what the aluminum criteria are for receiving waters with
19 a pH below 6.5, has the Department now itself created an
20 ambiguity?

21 MS. PINTADO: No.

22 MR. SCHLENKER-GOODRICH: If I was a member of
23 the public and I referred to the water quality
24 standards, how would I know what aluminum criterion
25 applies to a water where the pH is below 6.5?

1 MS. PINTADO: Not from the standards perhaps,
2 but in the assessment protocols, we would make that
3 clear.

4 MR. SCHLENKER-GOODRICH: Thank you,
5 Ms. Pintado.

6 I want to turn now to something that Amigos
7 Bravos does support from the Department, which is the
8 Department's proposal to upgrade the designated use of
9 I think it's nine stream segments to primary contact
10 use.

11 MS. PINTADO: Yes.

12 MR. SCHLENKER-GOODRICH: This proposal is
13 based in part on the fact that there are no use
14 attainability analyses to support secondary contact for
15 these stream segments. Is that correct?

16 MS. PINTADO: Correct.

17 MR. SCHLENKER-GOODRICH: In the absence of a
18 use attainability analysis, EPA requires New Mexico to
19 apply Clean Water Act 101(a)(2) uses, fishable/swimmable
20 uses, to these waters; correct?

21 MS. PINTADO: Yes.

22 MR. SCHLENKER-GOODRICH: Does designation of
23 secondary contact uses obviate the Clean Water Act
24 requirement to protect existing uses; in other words,
25 those uses that have occurred since 1975?

1 MS. PINTADO: No.

2 MR. SCHLENKER-GOODRICH: So if swimming or
3 other primary contact use occurred anytime after 1975,
4 primary contact would be considered an existing use and
5 the Clean Water Act would mandate protection of this
6 use?

7 MS. PINTADO: Correct.

8 MR. SCHLENKER-GOODRICH: Therefore, to meet
9 EPA requirements, these nine segments must be given
10 primary contact protections unless there is a use
11 attainability analysis showing that these uses are both
12 not existing and not attainable?

13 MS. PINTADO: Correct.

14 MR. SCHLENKER-GOODRICH: In accord with the
15 rebuttable presumption about protection of Clean Water
16 Act 101(a)(2) uses, you don't really need evidence to
17 support application of primary contact, but you do need
18 evidence in a use attainability analysis to apply only
19 secondary contact uses; is that right?

20 MS. PINTADO: That's right.

21 MR. SCHLENKER-GOODRICH: By providing evidence
22 of primary contact use for these segments, the
23 Department then has effectively exceeded its evidentiary
24 burden?

25 MS. PINTADO: Yes.

1 MR. DAIL: That's correct.

2 MR. SCHLENKER-GOODRICH: If the Commission
3 does not upgrade these nine segments with primary
4 contact uses, would EPA require the preparation of use
5 attainability analyses to demonstrate why
6 fishable/swimmable uses do not apply to these segments?

7 MS. PINTADO: Yes.

8 MR. SCHLENKER-GOODRICH: Thank you.

9 No further questions.

10 MR. CHAVEZ: Thank you.

11 Any questions on cross-examination from
12 Chevron?

13 MR. ROSE: No questions.

14 MR. CHAVEZ: Any cross from Freeport?

15 MS. CHAPPELLE: No cross.

16 MR. CHAVEZ: Los Alamos?

17 MR. DOLAN: Mr. Hearing Officer, Tim Dolan for
18 Los Alamos.

19 We have no questions.

20 MR. CHAVEZ: Thank you.

21 At this point I think we've got about
22 15 minutes before we pack up and have to get out of
23 here, so let me go ahead and turn to the Commission for
24 the beginning of their cross and then we can finish up
25 in the morning.

1 So, Mr. Chairman.

2 MR. SCHLENKER-GOODRICH: Mr. Hearing Officer,
3 just one thing about public comment provisions for the
4 end of the day.

5 MR. CHAVEZ: That's what we're going to take
6 up in the limited time here.

7 MR. SCHLENKER-GOODRICH: Thank you.

8 MR. DOMINGUEZ: Okay. We'll turn to questions
9 from the Commission.

10 Does anybody have questions?

11 I see Commissioner Hutchinson.

12 CROSS EXAMINATION BY COMMISSION MEMBERS

13 MR. HUTCHINSON: Just a quick question for
14 Ms. Pintado.

15 The EPA water quality standards regs, the
16 final and the draft, say that they apply to waters of
17 the US.

18 MS. PINTADO: Sure.

19 MR. HUTCHINSON: And also I -- I'm questioning
20 -- okay, I'll ask the question, Mr. Chairman.

21 Is the State of New Mexico actually obligated
22 to follow these? I mean, they, you know, publish a
23 proposed rule, they issue a final rule after comments,
24 et cetera. Like for the use attainability analysis, it
25 has to be consistent with EPA's regulation.

1 Are we obligated to follow this proposed
2 rule?

3 MS. PINTADO: Well, the water quality
4 standards are obligated to abide by the Clean Water Act
5 also; and where the Clean Water Act -- in federal
6 actions for permits, we would definitely be required to
7 follow them, yes.

8 MR. HUTCHINSON: Okay. In waters of the US?

9 MS. PINTADO: Yes, sir.

10 MR. HUTCHINSON: And those have now been
11 invalidated by the court, their definition.

12 MS. PINTADO: I can't speak to that.

13 MR. HUTCHINSON: Okay. Thank you.

14 MS. DeROSE-BAMMAN: Does anyone else want to
15 go first because --

16 MR. DOMINGUEZ: Commissioner Waters.

17 MR. WATERS: On those nine streams that you're
18 changing from secondary to primary classification, how
19 many NPDES permits assigned to municipally or publicly
20 owned treatment plants are there on those nine
21 particular stretches, total?

22 MS. LEMON: There are four.

23 MR. WATERS: Can you name them?

24 MS. LEMON: Yes. Truth or Consequences
25 wastewater treatment plant, Abiquiu wastewater treatment

1 plant, Artesia wastewater treatment plant, and Fort
2 Sumner wastewater treatment plant.

3 MR. WATERS: That's all I've got.

4 MR. DOMINGUEZ: Commissioner Pattison.

5 MR. PATTISON: Thank you, Mr. Chairman.

6 Can you explain to me the difference between
7 waters of the state and waters of the US, as far as it
8 applies to New Mexico? Maybe give us an example.

9 MS. PINTADO: Well, do you want to cover that?

10 MR. KOUGIOULIS: Waters of the state includes
11 all waters of the US, so that's part of the definition
12 of waters of the state, is it does include all waters of
13 the US. So it is, I guess, more water than what the
14 waters of the US would encompass.

15 The difference, I think, is probably site
16 specific to some degree.

17 As we mentioned, we have some waters that we
18 used to call unclassified but need further
19 determination, and that comes out of a site-specific
20 analysis. So probably action driven, a permit,
21 something like that may -- would generally instigate a
22 question like that.

23 MR. PATTISON: What about ephemeral waters,
24 how do they apply?

25 MR. KOUGIOULIS: To what specifically?

1 MR. PATTISON: How do they fit in your
2 definition? Ephemeral waters, in other words, a stream
3 that's dry most of the time.

4 MR. KOUGIOULIS: We have a definition in our
5 standards of what ephemeral waters are.

6 MR. PATTISON: Is it a water of the US or a
7 water of the state?

8 MR. KOUGIOULIS: That is very much a
9 site-specific determination, because the Army Corps has
10 their own guidance on determination of intermittent and
11 ephemeral waters in the Southwest and we have our
12 hydrology protocol.

13 MR. PATTISON: How does the -- how do playa
14 lakes fit in the picture?

15 And I'm having a hard time hearing you.

16 MR. KOUGIOULIS: Sorry.

17 I guess, could you be more specific? In the
18 picture of a particular proposal that we're proposing,
19 or just in general how do playa lakes fit into
20 something?

21 MR. PATTISON: Whatever applies to what we're
22 here for today.

23 MR. KOUGIOULIS: I don't believe that we're --

24 MS. BECKER: Louder.

25 MR. KOUGIOULIS: I don't believe we are --

1 playa lakes are part of the definition of a water of the
2 state, but I don't think we have anything -- a specific
3 proposal addressing or identifying playa lakes as the
4 subject or focus of a proposal.

5 MR. PATTISON: I will have more questions on
6 this later, Mr. Chairman.

7 Thank you.

8 MR. DOMINGUEZ: Okay. A couple of quick
9 questions, I believe, hopefully.

10 Back to the nine bodies of water that are
11 being moved from secondary to primary, it's kind of been
12 noted that there has been references that some of these
13 bodies of water have been seen being used for swimming,
14 et cetera.

15 Is there anything that the Department utilizes
16 to distinguish if that use is actually safe, or if
17 somebody is just swimming in a water, it's assumed that
18 it's primary contact attainable, or does the Department
19 actually look at something to say it's not just some
20 idiot out there swimming somewhere that they shouldn't
21 be?

22 MS. LEMON: Common sense.

23 We want to protect for the public health and
24 the environment, and primary contact recreation use and
25 criteria protect for swimming.

1 In order to prove that that is not attainable,
2 that secondary contact is the more appropriate use and
3 people shouldn't be swimming in there, we would have to
4 conduct a use attainability analysis to evaluate that
5 and scientifically support that decision.

6 We do not have that -- we have not found any
7 of that scientific evidence that's supportive of a
8 secondary contact use, but we have seen people using as
9 an existing use and probably an attainable use primary
10 contact.

11 MR. DOMINGUEZ: Okay. Switching to the UAA on
12 the Animas.

13 MR. DAIL: Yes.

14 MR. DOMINGUEZ: Refresh my memory of when that
15 was completed. Was that 2013? Did I hear correct on
16 that?

17 MR. DAIL: I believe the dates on --

18 MR. DOMINGUEZ: I believe that's Exhibit 50.

19 MS. LEMON: 50.

20 MR. DAIL: Okay. The public comment permit on
21 the draft Animas UAA opened November 18th, 2013, and
22 closed December 20th, 2013.

23 MR. DOMINGUEZ: Okay. Would any of the recent
24 unfortunate incidents connected to the Animas River
25 change any of the perspective on the UAA, or is there

1 anything that due to the --

2 MR. DAIL: That's a good question.

3 MR. CHAVEZ: -- release from the Gold King
4 Mine that would need to be reevaluated regarding that
5 UAA?

6 MR. DAIL: That's a good question, Chairman.

7 The UAA was focused on looking at the
8 supporting attainable uses for certain fish communities
9 as it relates to water temperature.

10 So we've divided fish communities into waters
11 largely based on temperature regimes that is supportive
12 of those fish communities.

13 Certainly, pollution can impact the thriving
14 of those fish communities, but the UAA itself is fairly
15 narrow in this case and speaks only to what are the
16 supported uses.

17 So even if a catastrophic event, or even
18 chronic mine pollution, was affecting the Animas, such
19 that it affected those communities, we would still
20 support that we know what those communities are, we know
21 what they should be, we may not be right there, so it
22 triggers another question how do we get to where it
23 should be.

24 Right now, what we know about this UAA, which
25 hasn't changed, is specific fish communities indicate

1 that the cool-water aquatic life use is the most
2 supportable for those two segments in the UAA.

3 MR. DOMINGUEZ: Okay.

4 MR. HUTCHINSON: Mr. Chairman, on that point.

5 MR. DOMINGUEZ: Yes, Commissioner Hutchinson.

6 MR. HUTCHINSON: Did the past drought
7 conditions have an effect on the UAA's conclusions
8 resulting in the proposal for classifying them as
9 ephemeral?

10 MR. DAIL: Do you want to do that?

11 MR. KOUGIOULIS: Yes. You're referring to the
12 hydrology protocol use.

13 So as part of the hydro protocols we do, of
14 course, look at drought conditions. Specifically, we
15 look at what's called the standardized precipitation
16 index. That is basically an index that quantifies the
17 relative amount of either surplus water or deficit water
18 for a particular region over a particular time frame.

19 What we focus on is the type of drought that
20 would affect hydrologic -- it's a hydrologic drought
21 that would affect water tables, would affect base flow
22 that go into a stream.

23 So, for instance, you may have a three-month
24 drought that may affect soil conditions. A six-,
25 nine-month drought may be more of an agricultural

1 drought. But we're looking for a drought that would be
2 in the 12-month category, something where it's
3 significant and it would start to influence the results
4 of our HP.

5 So we have guidance on when we can operate and
6 perform the HP, and we try to stay outside of a range
7 where we feel like a type of drought may be biasing or
8 influencing the results so that we're not seeing what
9 would be naturally attainable.

10 MR. HUTCHINSON: Thank you, Mr. Chairman.

11 MR. LONGWORTH: On that point.

12 MR. DOMINGUEZ: Commissioner Longworth.

13 MR. LONGWORTH: So let me make sure I
14 understand what you're saying.

15 You're saying that you use a 12-month period
16 to determine whether or not there is a drought?

17 MR. KOUGIOULIS: No. So the standardized
18 precipitation index, the SPI, can use any amount of time
19 previous to when we would go into the field.

20 The way it was developed is to each amount of
21 -- the time frame you select is more indicative of what
22 you're trying to assess.

23 So when I say "soil moisture" -- if you
24 haven't had rain in three months, you're going to really
25 see that, but if you hadn't had rain in three months,

1 that may not be affecting the water table in that time
2 frame.

3 So we're looking for something -- so that --
4 the 12-month is getting to be a pretty -- I wouldn't say
5 severe, it is a moderate drought, that you're starting
6 to look at if you're getting deficits in water, and
7 those are the ones that we feel would manifest and the
8 literature supports would affect base flow and water
9 table levels.

10 MR. LONGWORTH: So a follow-up question is,
11 then, so if we have no snowpack, which is let's just say
12 it's six-month period, that's going to affect flow, how
13 do you account for that?

14 MR. KOUGIOULIS: Well, so that would be -- if
15 it was snowpack and it was something that came down
16 every year, that would fall under the definition of
17 intermittent and not under ephemeral, and so what we're
18 looking at are the ephemeral streams in this particular
19 proposal.

20 So as our definition in the standards say that
21 intermittent streams are those that are seasonal, that
22 are related to snowmelt and such, it wouldn't be the
23 focus of an HP that is trying to assign uses that would
24 be an ephemeral water.

25 MS. LEMON: And I would clarify that the index

1 that Mr. Kougioulis is describing, we use that to
2 identify when we should go out into the field to take
3 our measurements and evaluate the conditions.

4 So if it's under a severe drought, we won't
5 go, or we will definitely be advised that we may be
6 influencing the results that we're getting. So we use
7 that index to evaluate when we should go out in the
8 field. But once we're out in the field, we collect the
9 data and information that we need to determine the
10 natural hydrology of the system. And it looks at
11 multiple indicators, both biological and geomorphic
12 indicators of flow, to determine, you know, whether a
13 stream is naturally ephemeral, intermittent or
14 perennial.

15 So that index is used to evaluate when we
16 collect our data. It's not necessarily -- it is part of
17 that process, but we collect data when we feel it's the
18 most representative of the conditions to find natural
19 hydrology.

20 Does that --

21 MR. LONGWORTH: I'll think about it overnight.

22 MS. LEMON: Okay. Sorry.

23 MR. DOMINGUEZ: Mr. Hearing Officer, to help
24 you with your scheduling, I know that Commissioner
25 DeRose-Bamman has some questions, I was going to ask

1 her --

2 MS. DeROSE-BAMMAN: May I ask one today?

3 MR. DOMINGUEZ: Go ahead.

4 I think we just have one question from the
5 Commission.

6 MR. CHAVEZ: Please continue.

7 MS. DeROSE-BAMMAN: Thank you, Mr. Hearing
8 Officer and Mr. Chair. Thank you.

9 I do have several questions throughout -- for
10 all of them, but I want to focus on the temporary
11 standards provision for today.

12 We have had the environmental -- the
13 municipalities I represent have had an opportunity to
14 discuss some options for implementing the narrative
15 nutrient criterion over the last several years, and that
16 approach has been very different than what has been
17 drafted here in this petition; and as Amigos Bravos
18 counsel said, that in your testimony you had said that
19 the reason -- one of the reasons was to help us with the
20 nutrient criteria issue.

21 And so that's implementation of the narrative
22 criterion, and it doesn't translate to permit limits
23 until it gets implemented through an impairment decision
24 and then through a TMDL in most cases. Is that correct?
25 The narrative --

1 MS. LEMON: It --

2 MS. DeROSE-BAMMAN: I mean, it won't --

3 MS. LEMON: Not necessarily.

4 MS. DeROSE-BAMMAN: How will it impact the
5 municipality or any entity for the narrative in terms of
6 the permit condition?

7 MS. LEMON: It would most likely be an
8 impaired water. But a TMDL does not have to be in place
9 in order for this process to move forward. It could.

10 And those implementation -- the -- this
11 proposal is to provide a procedure so that we can
12 implement this. So it's kind of providing another tool
13 in the toolbox to help with the implementation aspect.

14 MS. DeROSE-BAMMAN: But one of the -- thank
15 you.

16 One of the baselines for being able to qualify
17 for a temporary standard is to -- to say that you meet
18 one of the factors in 131.10(g), which is also one of
19 the -- one of the factors that you can use to qualify
20 for a use attainability -- a use change.

21 MS. LEMON: Right.

22 MS. DeROSE-BAMMAN: And so I think we -- we've
23 been having those discussions over and over, that if
24 that's a fundamental requirement in order to achieve a
25 temporary standard, you might as well just go for the --

1 why would you not go for a use change, a designated use
2 change, if you can meet one of those six factors,
3 instead of a temporary standard?

4 MS. PINTADO: If the use is not attainable
5 because of one of the six factors, and that is
6 demonstrated, then a UAA may be the appropriate path.
7 But in cases where the use is attainable, just not
8 today, then a temporary standard would be the
9 appropriate path.

10 MS. DeROSE-BAMMAN: So we would need to
11 forecast the future in our work plan or our -- I'm
12 trying to understand how a petition would look just in
13 terms of the feasibility. I like the exploring
14 different tools, I think that's really important, but in
15 terms of the applicability of the way it's structured
16 right now, I don't see it working for the municipalities
17 because of the -- referring back to the criteria in
18 131.10(g).

19 I mean, because if you can meet that now, you
20 could just go for the change in use.

21 MS. PINTADO: And that may be the case, but we
22 anticipate most folks -- using municipalities as an
23 example, the Factor 6 economic factor would be the most
24 likely factor, and that seems a reasonable process.

25 MS. DeROSE-BAMMAN: But I even think within

1 our discussions on other approaches, like changes in the
2 water quality management plan, that even the economic
3 approach was even going to be challenging at times.

4 We haven't thoroughly gotten through that
5 discussion of how you could meet that factor in
6 particular.

7 So the -- just the way it's currently drafted,
8 I don't think -- it doesn't mesh with what we were
9 thinking along the lines -- other states have allowed
10 for temporary -- longer-term temporary changes, and I
11 like the fact that there isn't a time limit in here, so
12 that's good, but I also think that because of planning
13 purposes for -- to build huge treatment facilities, you
14 know, just where -- within -- if it's within the
15 standards approval, and then it has to be renewed every
16 cycle, that it could be a huge problem for the
17 municipalities.

18 And so I think the -- I'm going to probably
19 ask more questions on this a little bit later, but the
20 way it's currently drafted, I don't think it kind of
21 helps us. There may be other entities that it could
22 help, but I don't think it helps the municipalities
23 much.

24 MR. DOMINGUEZ: Mr. Hearing Officer, I think
25 this might be a good time that we turn it back to you

1 for public comment and then possibly pick up first thing
2 tomorrow with any follow-up questions from the
3 Commission.

4 MR. CHAVEZ: Thank you, Mr. Chairman and
5 Members of the Commission.

6 For clarification, there will be more
7 questions from the Commission for these witnesses in the
8 morning, I'm assuming.

9 MR. DOMINGUEZ: Yes.

10 MR. CHAVEZ: Thank you.

11 So at this point, we want to move towards
12 wrapping up for the day, so I want to open it up and ask
13 for general non-technical public comment.

14 Please approach.

15 And the witnesses are excused until the
16 morning.

17 Feel free to come up and take a seat.

18 MS. PERROTTE: Thank you.

19 (Oath administered to Marlene Perrotte.)

20 MS. PERROTTE: Thank you.

21 MARLENE PERROTTE

22 after having been first duly sworn or affirmed,
23 provided public comment as follows:

24 PUBLIC COMMENT

25 MS. PERROTTE: Dear Members of the New Mexico

1 Water Quality Control Commission, I am Marlene Perrotte,
2 and I am speaking in support of the positions of the
3 Sisters of Mercy in Albuquerque, the Partnership for
4 Earth Spirituality, and the Communities for Clean Water.

5 I'm really grateful that we have such a
6 Commission, because given what we are dealing with here
7 in New Mexico, we're not only talking about quality, but
8 we're talking about quantity, and it's how we are going
9 to protect this great holy resource that is the
10 lifeblood of all our citizens.

11 Our Public Trust Doctrine of the United States
12 Common Law passed in 1647 is the principle that the
13 government has an affirmative duty to protect natural
14 resources for public use.

15 You, Commissioners, have the duty to be the
16 legal protectors of the commonwealth for the common
17 good.

18 We request that you adopt Amigos Bravos'
19 proposal to strengthen the aluminum standard and to
20 reverse the present weakened New Mexico aluminum water
21 quality standard, and to reject the faulty data/
22 research of the hardness-based solutions standard that
23 is -- that is at present.

24 I also want to say that permits should not be
25 to adjust to the needs of polluters and giving more time

1 and understanding, which weakens quality, but rather we
2 must protect the commonwealth of this state and demand
3 high quality, even if it means closing it down until
4 there is proper cleanup.

5 I also urge this Commission to reject the New
6 Mexico Environment Department temporary standard
7 proposal. We cannot allow polluters to have weak --
8 weaker permit levels and increase pollution into our
9 rivers and streams. We look to you as our defenders of
10 the commonwealth.

11 Thank you very much.

12 MR. CHAVEZ: Thank you.

13 Is there any other public comment?

14 Please come forward.

15 Feel free to sit down and state your name.

16 (Oath administered to Joan Brown.)

17 JOAN BROWN

18 after having been first duly sworn or affirmed,
19 provided public comment as follows:

20 PUBLIC COMMENT

21 MS. BROWN: My name is Joan Brown, and I'm a
22 Franciscan Sister.

23 I, first of all, want to thank you for all of
24 your work, which is very complex, because you're dealing
25 with water municipalities, you're dealing with

1 extractive industries, you're dealing with other kinds
2 of industries, and you're dealing with the whole common
3 good of the State of New Mexico.

4 I'm executive director of New Mexico
5 Interfaith Power and Light. So our concern really is,
6 as we move into what some of you were talking about,
7 droughts and concerns about water and the quality as
8 well as the quantity, and as we have less water at
9 certain times, we all know that the water quality can be
10 impaired more easily.

11 So the issues that you're dealing with in this
12 triennial review are quite important.

13 I'd also like to just note, as kind of a
14 caveat and overview, that Pope Francis just came out
15 with the Laudato Si', which I think some of you might be
16 aware of, and in that, in addressing climate change and
17 economics and poverty issues, one of the main concerns
18 was water, and he said in all of these issues water is
19 very precious and it's the lifeblood, and once it's
20 impaired, sometimes it is impaired and it cannot be
21 unimpaired.

22 So given that, I have some concerns about
23 weaker standards. I think, if anything, we should be
24 maintaining high standards.

25 I would recommend that the standard for

1 aluminum, that the mining industry weakened, that I
2 support the Amigos Bravos recommendation of reverting to
3 the EPA standards for that particular area.

4 As a citizen, I'm also -- I don't understand
5 all of it, because I'm not a technician, but I am
6 concerned about -- anytime I hear something about
7 temporary kind of permits or weaker standards.

8 Now, I can see where maybe that would be
9 helpful sometimes if there is like an emergency kind of
10 situation with a water utility, but I think some of
11 these things can be utilized by applicers, maybe
12 industry, that don't always have the moral or ethical
13 convictions that we hope that they have. And so I have
14 a concern about that weakening of the standards on
15 waters into which discharge is emitted, and the
16 cumulative effects of some of those discharges upon
17 water, because we're not just talking about water in the
18 state, because we are an arid state, so we always have
19 to address those cumulative.

20 I also believe in any of this that there
21 should always be a strong public hearing prior to plans
22 already being made up and proposing those plans.

23 Oftentimes I hear it from the public that they
24 are concerned that they get in at the last minute about
25 something when, quote, the decision is basically already

1 made. So I think we need to keep that in mind.

2 So the temporary standards is a big concern.
3 Another -- and I don't really agree with that.

4 Also, I'm concerned because we have such -- so
5 many small bodies of water and headwaters in many places
6 and also small ponds and wetlands that sometimes flow at
7 certain times of the year, that we really need to
8 protect those areas as well, those small bodies of
9 water, those wetlands, which serve many purposes in our
10 biological system.

11 So I would recommend not weakening the
12 standards on those as well.

13 So, yeah, I thank you for your work, and I
14 trust that you take into consideration these concerns
15 for the common good and the overall ethics of water.

16 Thank you.

17 MR. CHAVEZ: Thank you, Ms. Brown.

18 Is there any other members of the public that
19 would like to provide comment at this time?

20 Seeing none, this is the conclusion of day one
21 of the hearing.

22 We'll continue tomorrow morning with
23 cross-examination on NMED's witnesses, and we'll follow
24 with the presentation by Freeport-McMoRan.

25 Thank you.

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MR. WATERS: What time?

MR. CHAVEZ: 9:00 AM.

(Proceedings recessed at 4:59 PM.)

1 STATE OF NEW MEXICO.)

2) ss.

3 COUNTY OF BERNALILLO)

4 I, Kathy Townsend, the officer before whom the
5 foregoing hearing was taken, do hereby certify that the
6 witnesses whose testimony appears in the foregoing
7 transcript were duly sworn by me; that I personally
8 recorded the testimony by machine shorthand; that said
9 transcript is a true record of the testimony given by
10 said witnesses; that I am neither attorney nor counsel
11 for, nor related to or employed by any of the parties to
12 the action in which this matter is taken, and that I am
13 not a relative or employee of any attorney or counsel
14 employed by the parties hereto or financially interested
15 in the action.

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'80s [1] - 92:24 'at [1] - 80:24 'primary [1] - 76:9 'secondary [1] - 88:15	13th [2] - 1:14, 6:3 14 [2] - 40:8, 45:1 14-05(R) [1] - 1:3 14-05(R) [3] - 6:7, 6:23, 103:13 14th [1] - 52:8 15 [2] - 31:6, 154:22 15.C [2] - 51:12, 51:17 15.D [1] - 51:18 155 [1] - 5:18 15th [1] - 52:8 16 [3] - 40:22, 41:10, 41:21 162 [1] - 105:7 1647 [1] - 171:12 1663 [1] - 4:9 17 [5] - 77:10, 78:16, 78:17, 78:18, 79:22 170 [1] - 5:20 172 [1] - 5:22 17th [1] - 69:10 18 [1] - 5:4 18th [2] - 69:8, 160:21 19 [1] - 39:23 1975 [5] - 86:1, 86:2, 86:7, 152:25, 153:3 1980s [2] - 74:8, 95:14 1988 [2] - 73:23, 148:16 1:02 [2] - 1:19, 6:5 1st [2] - 36:7, 69:13	2005 [12] - 31:13, 32:10, 73:23, 90:12, 91:4, 94:20, 106:21, 107:3, 107:15, 108:13, 110:23, 111:12 2007 [2] - 89:4, 94:19 2009 [3] - 32:9, 32:11, 74:23 2010 [2] - 54:10, 54:11 2011 [2] - 53:19, 54:10 2012 [3] - 24:25, 93:17, 93:18 2013 [12] - 12:15, 21:6, 36:3, 52:8, 63:18, 69:8, 69:9, 69:10, 149:16, 160:15, 160:21, 160:22 2014 [10] - 36:7, 36:10, 36:21, 52:8, 52:15, 52:20, 69:17, 70:13, 78:12, 144:10 2015 [9] - 1:15, 13:3, 38:10, 41:1, 41:8, 45:24, 70:21, 98:7, 105:9 206 [2] - 86:12, 87:7 208 [1] - 3:11 20th [3] - 69:9, 144:10, 160:22 21 [4] - 129:23, 133:3, 133:8 213 [1] - 87:25 21st [3] - 45:24, 98:7, 105:8 221 [1] - 95:4 23 [2] - 5:6, 177:19 25 [1] - 71:22 2540 [1] - 3:17 25th [1] - 85:25 28th [1] - 13:3	2005(b) [1] - 47:20 307 [1] - 1:17 30th [2] - 36:10, 69:14 31 [1] - 52:16 310 [1] - 95:4 32.2 [1] - 30:4 325 [2] - 3:22, 4:5 338-3945 [1] - 2:13 37 [2] - 93:10, 93:13 39 [4] - 5:8, 55:11, 55:12, 55:14 3:10 [1] - 103:6 3:28 [1] - 103:6 3rd [1] - 36:3	53 [1] - 5:10 57 [2] - 65:5, 65:18 575 [1] - 3:13 58 [2] - 64:23, 64:24 59 [1] - 66:22 5:00 [1] - 114:13
1			4	6
1 [7] - 1:21, 25:23, 49:7, 109:9, 109:13, 109:24, 142:3 10 [5] - 40:22, 41:10, 42:4, 49:19, 50:5 10(F) [1] - 42:5 10-minute [1] - 100:6 10.F [1] - 51:1 10.F(1)(a) [1] - 49:12 101(a) [1] - 87:12 101(a)(2) [9] - 27:15, 31:19, 92:5, 107:9, 111:2, 111:11, 111:13, 152:19, 153:16 103 [2] - 83:11, 83:16 10th [2] - 69:17, 94:19 11 [1] - 24:4 11/16/06 [1] - 110:5 115 [1] - 5:16 116 [1] - 84:3 1190 [1] - 2:17 12 [2] - 64:16, 125:19 12-month [3] - 163:2, 163:15, 164:4 12.G [1] - 47:12 12.H [5] - 48:2, 51:1, 125:18, 125:21, 142:23 12/31/15 [1] - 177:19 120 [1] - 5:17 1239 [1] - 3:5 124 [1] - 85:17 126 [1] - 95:4 128 [4] - 11:19, 13:20, 95:4, 120:18 13 [6] - 40:13, 56:10, 58:20, 62:9, 77:7, 78:8 131.10(g) [1] - 167:18 131.10(g) [1] - 168:18 131.10(j) [1] - 30:22 131.13 [1] - 45:1 131.14 [1] - 98:1 131.2 [1] - 30:15 131.3(o) [1] - 99:15	2 2 [11] - 59:16, 59:20, 78:14, 81:25, 82:6, 82:11, 83:10, 92:11, 92:25, 142:4, 142:5 20 [6] - 19:7, 46:6, 56:9, 62:8, 62:12, 71:21 20.6.4 [3] - 1:7, 6:20, 41:18 20.6.4.10 [1] - 41:16 20.6.4.10.F(3) [1] - 101:2 20.6.4.103 [2] - 79:22, 80:21 20.6.4.116 [1] - 79:8 20.6.4.13 [1] - 121:24 20.6.4.16 [1] - 8:18 20.6.4.7.E(3) [1] - 79:11 20.6.4.7.P(5) [1] - 76:8 2004 [1] - 24:2	3 3 [2] - 84:17, 142:5 30 [2] - 36:4, 106:19 30-day [4] - 52:7, 58:7, 58:10, 69:6 303(c) [2] - 46:21, 53:6 303(c)(1) [1] - 19:10 303(c)(3) [1] - 20:13 303(d) [2] - 47:20, 146:10 304(a) [2] - 149:5, 151:15	4 4 [5] - 19:7, 49:14, 136:3, 136:4, 136:5 4-22 [4] - 109:9, 109:20, 110:8, 111:5 40 [5] - 30:15, 30:22, 45:1, 55:7, 97:25 401 [4] - 25:9, 44:19, 143:6, 143:8 402 [10] - 138:22, 139:6, 139:7, 139:10, 142:24, 143:4, 143:6, 143:8, 143:19, 143:22 403 [1] - 67:19 404 [7] - 44:20, 47:9, 67:19, 142:24, 143:15, 143:18, 143:23 42 [1] - 45:14 46 [4] - 55:16, 62:25, 65:9, 65:19 490 [1] - 1:17 4:59 [1] - 176:3 4th [6] - 38:9, 38:12, 41:1, 41:8, 77:17, 149:16	6 6 [13] - 19:7, 49:25, 61:18, 61:20, 61:24, 62:2, 62:4, 70:10, 70:13, 70:23, 111:23, 123:18, 168:23 6.5 [14] - 144:7, 144:20, 144:22, 145:2, 145:18, 145:21, 146:2, 146:7, 146:9, 147:20, 150:5, 150:7, 151:19, 151:25 60 [1] - 36:9 60-day [1] - 69:14 602 [1] - 3:12 613-4197 [1] - 3:13 63 [1] - 5:12 6565 [1] - 2:12 66 [1] - 25:16 667-7512 [1] - 4:10
				7
				7 701 [1] - 95:4 702 [1] - 95:4 71 [1] - 5:14 73 [1] - 5:15 74-6-4(D) [2] - 45:4, 89:24 750 [1] - 149:12 77-89 [4] - 77:7, 78:9, 92:7, 93:8 79-89 [1] - 79:7
				8
				8 [3] - 5:3, 37:20, 50:3 80 [2] - 30:5, 105:7 803 [2] - 68:5, 68:22 804 [3] - 68:6, 68:13, 68:16 807 [1] - 68:15 827-0528 [1] - 2:19 84 [1] - 148:3 87 [7] - 145:3, 145:23, 148:12, 148:20, 148:23, 149:11, 150:8 87048-2540 [1] - 3:17

KATHY TOWNSEND COURT REPORTERS

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<p>87110 [1] - 2:13 87501 [4] - 2:18, 3:6, 3:22, 4:5 87545 [1] - 4:10 87571 [1] - 3:12 88 [1] - 148:17 888-6600 [1] - 3:18 8th [1] - 36:21</p>	<p>8:22 accord [2] - 140:25, 153:14 accordance [3] - 6:24, 51:16, 136:1 according [5] - 9:6, 45:14, 47:23, 102:5, 107:8 accordingly [2] - 50:8, 92:6 account [9] - 128:11, 129:16, 129:20, 129:22, 130:5, 140:9, 141:7, 164:13 accounted [1] - 127:23 accounting [1] - 131:17 achievable [4] - 46:9, 68:21, 126:16, 139:19 achieve [13] - 29:2, 43:16, 44:2, 46:12, 51:5, 123:20, 130:22, 131:11, 132:2, 133:25, 134:17, 141:14, 167:24 achieved [5] - 28:23, 57:25, 58:2, 133:5, 141:10 achieving [3] - 97:15, 123:19, 134:1 acknowledge [1] - 148:15 act [2] - 6:17, 117:3 Act [54] - 6:25, 19:11, 19:15, 19:18, 19:25, 20:3, 20:14, 24:19, 25:10, 26:25, 27:3, 27:9, 27:11, 28:24, 30:7, 30:16, 31:18, 39:15, 40:2, 43:2, 44:19, 45:4, 46:21, 47:9, 47:17, 47:19, 50:13, 51:3, 53:6, 59:15, 60:17, 85:24, 87:12, 89:25, 90:3, 116:11, 117:6, 142:24, 144:8, 145:6, 145:7, 145:9, 145:16, 145:20, 146:1, 148:1, 149:7, 152:19, 152:23, 153:5, 153:16, 156:4, 156:5 Acting [2] - 21:7, 22:20 acting [6] - 23:9, 23:12, 24:22, 24:25, 25:13, 25:20 action [9] - 94:21,</p>	<p>94:24, 107:19, 107:21, 122:22, 123:5, 157:20, 177:12, 177:15 actions [10] - 44:20, 47:9, 95:7, 118:9, 131:11, 131:16, 132:8, 132:10, 141:4, 156:6 activities [10] - 24:20, 35:3, 47:11, 71:25, 76:23, 84:20, 97:9, 115:14, 116:9, 119:3 activity [1] - 90:23 acts [1] - 117:10 actual [2] - 93:1, 137:23 acute [2] - 148:13, 149:12 add [5] - 63:5, 72:15, 73:9, 94:10, 97:10 added [4] - 48:2, 49:12, 49:14, 50:3 adding [3] - 22:13, 22:14, 97:8 addition [6] - 12:2, 21:22, 28:16, 41:21, 65:6, 135:25 additional [5] - 36:17, 40:19, 93:22, 126:8, 126:9 additionally [1] - 69:14 additions [2] - 40:14, 51:9 address [13] - 14:24, 18:8, 21:8, 22:4, 22:13, 24:11, 24:12, 26:14, 32:6, 32:9, 40:18, 129:7, 174:19 addressed [2] - 11:6, 21:2 addresses [1] - 57:16 addressing [3] - 59:14, 159:3, 173:16 adds [1] - 42:5 adequate [1] - 95:1 adhere [2] - 131:2, 132:18 adjust [1] - 171:25 adjustment [1] - 67:20 administered [4] - 8:9, 22:22, 170:19, 172:16 Administrative [3] - 19:8, 41:16, 66:2 administrator [4] -</p>	<p>6:22, 7:17, 111:24, 112:1 admission [2] - 12:8, 103:17 admit [1] - 18:7 admitted [2] - 12:25, 104:13 adopt [30] - 19:21, 19:22, 22:8, 26:5, 27:6, 28:16, 30:15, 35:1, 40:25, 42:6, 43:1, 44:13, 44:23, 45:2, 45:5, 45:11, 48:10, 55:12, 55:14, 55:15, 65:18, 102:22, 107:16, 126:13, 127:7, 136:25, 148:20, 150:3, 150:25, 171:18 adopted [26] - 21:1, 22:12, 31:14, 32:8, 32:11, 33:4, 42:11, 43:17, 44:10, 45:12, 45:15, 46:19, 47:7, 47:12, 49:9, 50:12, 55:23, 65:23, 90:1, 93:2, 93:4, 102:3, 106:17, 109:8, 137:2, 144:25 adopting [8] - 19:19, 25:20, 30:23, 40:3, 46:17, 55:20, 66:17, 101:24 adoption [2] - 42:15, 44:11 adopts [1] - 20:11 ads [1] - 36:13 advanced [1] - 129:11 advised [2] - 134:14, 165:5 affect [7] - 35:15, 162:20, 162:21, 162:24, 164:8, 164:12 affected [4] - 44:22, 47:4, 48:22, 161:19 affecting [5] - 7:10, 31:5, 56:18, 161:18, 164:1 affirmed [8] - 8:12, 23:2, 39:3, 53:12, 63:9, 71:12, 170:22, 172:18 afternoon [8] - 6:10, 6:15, 10:13, 18:24, 73:3, 120:13 agencies [1] - 137:20 agency [2] - 19:17, 119:3</p>	<p>Agency [1] - 20:15 agenda [1] - 6:7 ago [1] - 118:21 agree [6] - 18:5, 97:11, 102:21, 104:16, 118:1, 175:3 agreeing [1] - 11:18 agreement [2] - 11:21, 12:7 agreements [1] - 13:5 agricultural [2] - 20:8, 162:25 Agronomy [1] - 64:10 ahead [7] - 18:20, 113:13, 114:18, 116:24, 129:13, 154:23, 166:3 aimed [2] - 128:3, 143:3 air [1] - 67:21 Alamos [11] - 4:2, 4:9, 4:10, 10:22, 11:17, 11:19, 104:17, 113:16, 113:22, 154:16, 154:18 Albuquerque [3] - 2:13, 37:5, 171:3 algal [1] - 89:3 alleviate [1] - 70:9 Allie [1] - 68:17 allow [16] - 9:25, 44:1, 44:5, 44:23, 47:6, 49:12, 51:12, 97:13, 102:8, 104:22, 104:25, 116:20, 118:2, 121:21, 129:13, 172:7 allowable [1] - 50:20 allowed [4] - 35:18, 44:15, 70:9, 169:9 allowing [3] - 44:9, 50:13, 147:15 almost [4] - 34:22, 34:23, 79:23, 117:7 alter [1] - 141:20 alteration [1] - 89:3 aluminum [32] - 14:17, 15:23, 16:9, 16:10, 16:21, 16:22, 17:12, 22:14, 144:1, 144:6, 145:1, 145:6, 145:17, 146:23, 146:25, 147:4, 147:8, 147:11, 147:16, 149:6, 149:18, 149:24, 150:9, 150:23, 151:4, 151:14, 151:16,</p>
9				
<p>9 [1] - 37:20 9/12/2017 [1] - 177:20 900.I(1) [1] - 144:4 920 [1] - 2:12 97 [4] - 51:8, 94:23, 108:6, 111:10 97(C) [3] - 41:22, 51:24, 52:22 98 [1] - 94:23 982-3873 [2] - 3:23, 4:6 982-9523 [1] - 3:6 99 [1] - 94:24 9:00 [1] - 176:2</p>				
A				
<p>A187 [1] - 4:9 abide [1] - 156:4 ability [1] - 57:8 Abiquiu [1] - 156:25 able [4] - 100:12, 122:15, 147:4, 167:16 absence [2] - 140:4, 152:17 absolutely [2] - 114:21, 139:18 accept [1] - 8:2 accepted [1] - 8:4 access [1] - 104:23 accessible [5] - 22:6, 80:25, 81:3, 83:13, 88:2 accidental [2] - 89:2, 89:17 accidentally [1] - 88:10 accommodate [1] - 134:16 accomplish [1] - 22:7 accomplished [1] - 10:1 accomplishes [1] - 96:10 accomplishing [1] -</p>				

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<p>151:18, 151:24, 171:19, 171:20, 174:1 AM [1] - 176:2 ambiguities [1] - 151:4 ambiguity [2] - 147:24, 151:20 ambiguous [1] - 148:6 amenable [2] - 134:20, 143:22 amend [1] - 19:21 amended [5] - 38:11, 97:1, 103:19, 106:10, 144:11 amendment [1] - 117:20 amendments [8] - 21:4, 36:8, 36:19, 36:23, 37:11, 37:21, 94:20, 117:1 AMENDMENTS [1] - 1:5 Americas [1] - 2:12 Amigos [27] - 3:9, 10:19, 11:16, 11:22, 12:1, 14:5, 14:18, 14:24, 15:11, 16:9, 16:24, 17:16, 41:24, 48:16, 50:2, 104:2, 113:3, 114:8, 114:12, 114:19, 120:5, 120:15, 128:16, 152:6, 166:17, 171:18, 174:2 ammonia [1] - 126:24 amount [4] - 34:18, 162:17, 163:18, 163:20 Ana [1] - 54:21 analyses [7] - 21:19, 43:18, 56:5, 66:5, 74:24, 152:14, 154:5 analysis [14] - 30:12, 31:2, 32:19, 52:4, 65:8, 67:13, 69:22, 95:2, 152:18, 153:11, 153:18, 155:24, 157:20, 160:4 analyzing [1] - 54:2 AND [1] - 1:6 Andrews [1] - 10:21 ANDREWS [2] - 3:21, 4:4 Animas [15] - 65:8, 65:12, 66:6, 67:12, 67:15, 69:7, 69:23, 69:24, 69:25, 70:12, 71:6, 160:12, 160:21,</p>	<p>160:24, 161:18 announced [1] - 36:3 answer [6] - 54:8, 89:8, 99:3, 114:7, 116:22, 122:25 answered [1] - 140:18 answers [2] - 95:5, 114:8 anti [6] - 128:1, 140:15, 141:18, 141:21, 141:25, 142:15 anti-deg [2] - 128:1, 141:18 anti-degradation [4] - 140:15, 141:21, 141:25, 142:15 anticipate [3] - 125:2, 131:22, 168:22 anticipated [1] - 13:15 anytime [2] - 153:3, 174:6 anyway [1] - 104:13 apologize [2] - 15:15, 122:3 apparent [1] - 121:22 appearance [2] - 8:2, 10:11 applicability [1] - 168:15 applicable [7] - 47:4, 47:24, 49:8, 94:3, 97:4, 124:3, 149:6 application [7] - 21:12, 21:18, 52:19, 58:4, 118:2, 121:23, 153:17 applications [4] - 22:10, 115:16, 115:20, 120:18 applied [8] - 43:4, 46:4, 46:25, 51:19, 57:10, 67:8, 90:6, 104:7 appliers [1] - 174:11 applies [7] - 46:4, 100:23, 127:14, 141:25, 151:25, 157:8, 158:21 apply [25] - 26:15, 29:15, 46:8, 47:2, 48:3, 49:16, 62:5, 108:19, 127:11, 129:2, 142:4, 142:12, 145:3, 148:6, 148:12, 150:7, 150:11, 150:23, 151:6, 152:19, 153:18,</p>	<p>154:6, 155:16, 157:24 applying [1] - 95:12 appreciable [1] - 88:18 appreciate [2] - 119:22, 120:19 appreciated [1] - 52:1 appreciates [1] - 12:5 appreciation [1] - 120:16 approach [5] - 108:12, 124:12, 166:16, 169:3, 170:14 approaches [1] - 169:1 appropriate [30] - 16:18, 19:13, 19:25, 20:5, 25:6, 35:2, 41:25, 43:20, 43:24, 45:7, 46:10, 50:14, 50:20, 57:9, 60:8, 61:3, 63:22, 68:20, 74:20, 90:3, 98:23, 100:1, 112:16, 125:8, 136:20, 137:3, 137:20, 160:2, 168:6, 168:9 appropriately [2] - 32:25, 112:21 approval [17] - 20:15, 38:14, 46:20, 52:21, 53:1, 53:6, 62:2, 62:3, 70:13, 70:20, 70:25, 71:1, 94:16, 136:9, 136:14, 141:1, 169:15 approve [10] - 20:16, 20:18, 31:17, 106:21, 107:16, 107:20, 107:21, 135:5, 135:6, 135:16 approved [19] - 32:18, 32:25, 43:22, 46:19, 47:7, 47:13, 53:5, 56:6, 102:16, 102:17, 110:18, 137:7, 137:10, 139:1, 141:9, 142:16, 142:20, 149:5 approves [3] - 20:11, 53:3, 92:14 approving [6] - 44:6, 44:7, 53:22, 61:16, 94:12, 135:10 April [3] - 36:3, 36:7, 69:13 aquatic [47] - 21:18, 22:15, 28:13, 28:14,</p>	<p>29:18, 30:3, 30:20, 31:9, 31:14, 32:13, 58:2, 58:3, 60:5, 60:21, 61:4, 66:6, 67:12, 67:17, 67:18, 67:20, 68:3, 68:6, 68:9, 68:18, 70:6, 71:24, 90:17, 91:7, 94:22, 107:6, 107:17, 107:25, 108:6, 109:2, 110:14, 110:19, 110:25, 111:9, 112:22, 145:19, 146:1, 147:1, 147:17, 149:11, 162:1 aquatics [1] - 146:23 area [4] - 8:23, 80:23, 81:12, 174:3 Areas [1] - 23:22 areas [1] - 175:8 argued [1] - 111:8 Arid [1] - 23:22 arid [1] - 174:18 Arizona [3] - 23:19, 23:24, 23:25 Army [1] - 158:9 ART [2] - 5:2, 8:11 Art [1] - 8:9 Artesia [1] - 157:1 aspect [2] - 9:17, 167:13 aspects [1] - 71:2 assemblages [1] - 67:25 assess [4] - 35:18, 47:19, 56:17, 163:22 assessed [2] - 24:19, 32:21 assessing [2] - 31:5, 53:22 assessment [3] - 63:19, 63:24, 152:2 Assessment [3] - 24:16, 24:23, 25:12 assign [5] - 32:12, 32:25, 52:21, 68:15, 164:23 assigned [6] - 35:10, 61:5, 68:9, 107:23, 123:10, 156:19 assigning [3] - 68:19, 111:14, 145:22 assignment [3] - 61:13, 67:25, 70:6 assignments [1] - 71:5 assist [2] - 53:25, 63:23 assistant [4] - 23:21, 64:14, 71:18</p>	<p>Assistant [1] - 2:17 associated [7] - 48:3, 56:10, 58:20, 62:5, 62:9, 66:20, 67:2 assume [1] - 38:20 assumed [3] - 24:7, 81:3, 159:17 assuming [2] - 144:24, 170:8 assumption [2] - 88:5, 89:13 assurance [3] - 53:20, 53:23, 63:25 assurances [1] - 141:9 assuring [1] - 57:9 attached [4] - 16:15, 128:16, 149:16, 151:10 attaching [1] - 16:16 Attachment [3] - 144:10, 148:5, 149:4 attainability [21] - 21:19, 30:12, 31:2, 32:19, 43:18, 52:4, 65:8, 66:5, 67:13, 69:22, 74:24, 85:24, 95:2, 152:14, 152:18, 153:11, 153:18, 154:5, 155:24, 160:4, 167:20 attainable [57] - 29:1, 29:24, 30:11, 30:17, 31:1, 31:24, 31:25, 32:4, 32:24, 33:9, 34:6, 34:24, 35:3, 43:10, 43:11, 43:21, 46:8, 50:18, 57:13, 57:22, 57:24, 58:1, 59:23, 60:4, 60:25, 61:15, 75:22, 76:2, 78:25, 79:1, 79:9, 79:12, 79:25, 80:2, 80:6, 80:7, 80:17, 80:18, 87:3, 87:9, 87:10, 91:22, 92:5, 100:20, 101:12, 108:16, 108:20, 131:12, 153:12, 159:18, 160:1, 160:9, 161:8, 163:9, 168:4, 168:7 attaining [1] - 27:11 attainment [6] - 31:6, 56:5, 56:19, 57:16, 59:18, 61:23 attempt [3] - 122:22, 123:5, 151:3 attendance [1] - 7:8</p>
--	---	--	--	--

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110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

(505) 243-5018 - Fax (505) 243-3606

<p>attention [1] - 11:9 Attorney [2] - 3:10, 4:8 attorney [4] - 73:5, 128:25, 177:10, 177:13 Attorneys [5] - 2:11, 3:5, 3:16, 3:21, 4:4 audience [1] - 54:5 August [4] - 24:2, 45:24, 98:7, 105:8 authorities [3] - 43:1, 44:23, 51:3 authority [4] - 48:9, 102:22, 123:13, 148:25 authorize [1] - 45:1 authorizes [2] - 45:5, 47:14 available [10] - 14:9, 35:17, 37:19, 69:4, 69:15, 70:8, 92:3, 95:3, 113:9, 138:9 avid [1] - 8:15 avoid [1] - 7:11 aware [7] - 35:14, 74:16, 74:21, 75:5, 118:18, 118:22, 173:16</p>	<p>57:16, 59:23, 60:25, 62:13, 75:21, 80:8, 81:7, 81:20, 83:16, 84:22, 89:14, 90:2, 90:7, 110:12, 116:6, 144:5, 144:19, 145:14, 145:16, 145:18, 145:25, 147:16, 147:21, 148:1, 152:13, 161:11, 171:22 baseline [1] - 131:19 baselines [1] - 167:16 bases [2] - 41:10, 77:4 basin [13] - 22:16, 51:20, 56:15, 56:16, 58:17, 62:17, 62:24, 66:4, 66:11, 83:12, 84:3, 86:13, 88:1 basins [4] - 58:18, 62:18, 62:25, 66:7 basis [23] - 28:9, 50:4, 77:8, 77:21, 78:22, 79:21, 79:23, 81:10, 87:1, 87:5, 87:7, 87:17, 87:21, 91:10, 93:5, 101:3, 118:3, 139:2, 144:13, 145:22, 148:10, 148:21, 150:22 BE [1] - 1:14 became [3] - 24:24, 111:21, 148:19 Becker [2] - 5:8, 10:14 BECKER [16] - 2:16, 38:25, 39:6, 53:10, 98:9, 98:17, 98:20, 98:25, 105:20, 105:23, 106:3, 109:14, 114:25, 128:13, 129:4, 158:24 become [3] - 24:15, 92:3, 143:11 becomes [2] - 7:16, 126:14 BEFORE [1] - 1:2 begin [4] - 10:10, 11:5, 120:15, 120:24 beginning [8] - 77:9, 78:9, 79:8, 80:21, 105:8, 136:23, 140:1, 154:24 behalf [3] - 10:22, 10:25, 20:21 behind [1] - 122:6 below [4] - 67:6, 147:20, 151:19,</p>	<p>151:25 BERNALILLO [1] - 177:3 better [3] - 14:19, 17:15, 18:6 between [10] - 56:23, 57:1, 60:23, 84:12, 113:15, 116:11, 121:10, 134:21, 146:17, 157:6 beyond [3] - 125:9, 126:8, 151:9 biasing [1] - 163:7 big [1] - 175:2 bioavailable [1] - 146:13 biologic [1] - 61:3 biological [3] - 28:3, 165:11, 175:10 biologists [1] - 71:22 biology [2] - 23:18, 64:5 bit [8] - 52:1, 54:5, 73:6, 120:20, 138:20, 144:4, 146:22, 169:19 BLM [1] - 84:22 bloom [1] - 89:3 board [1] - 104:7 boating [10] - 34:19, 34:22, 81:20, 88:3, 88:6, 88:11, 88:19, 88:23, 89:15, 89:22 bodies [4] - 159:10, 159:13, 175:5, 175:8 bodily [1] - 80:25 body [24] - 26:16, 28:21, 28:23, 33:4, 42:12, 42:21, 44:21, 46:7, 47:3, 57:10, 61:5, 97:5, 108:19, 127:13, 127:15, 127:17, 127:22, 129:17, 130:12, 130:24, 131:1, 140:10, 141:13, 146:25 bottom [1] - 149:22 bound [1] - 68:12 boundary [1] - 68:17 Box [2] - 3:17, 4:9 branch [1] - 66:14 branches [1] - 66:20 Brantley [3] - 86:14, 86:15, 86:20 Bravos [17] - 3:9, 10:19, 11:16, 11:22, 15:11, 17:17, 41:24, 48:16, 50:2, 104:2, 113:3, 114:12, 120:5, 128:16, 152:7,</p>	<p>166:17, 174:2 Bravos [7] - 12:1, 14:18, 14:24, 16:10, 16:24, 120:15, 171:18 break [3] - 100:6, 100:9, 103:16 brief [1] - 25:1 briefly [5] - 39:16, 41:12, 48:19, 56:1, 65:22 bring [3] - 18:17, 18:18, 18:20 brings [1] - 11:24 brought [2] - 14:25, 112:10 brown [1] - 175:17 Brown [2] - 172:16, 172:21 BROWN [3] - 5:21, 172:17, 172:21 Bryan [5] - 21:16, 22:23, 63:14, 82:16, 83:15 BRYAN [2] - 5:11, 63:8 build [1] - 169:13 Building [2] - 1:17, 2:18 burden [1] - 153:24 Bureau [86] - 21:7, 21:17, 22:21, 23:9, 23:10, 23:12, 24:2, 24:3, 24:5, 24:25, 25:2, 25:13, 25:20, 31:8, 33:22, 34:10, 34:13, 35:17, 35:25, 36:7, 36:11, 36:16, 36:20, 36:23, 37:13, 38:8, 39:11, 39:23, 40:17, 41:6, 42:22, 44:9, 44:10, 48:6, 48:12, 51:21, 52:2, 52:23, 52:24, 53:21, 54:19, 55:3, 55:6, 55:11, 55:12, 55:14, 55:16, 55:17, 55:20, 57:24, 58:13, 58:24, 59:2, 59:21, 60:7, 61:20, 62:25, 63:17, 64:2, 65:9, 65:11, 65:18, 66:15, 69:18, 69:20, 69:24, 70:9, 70:14, 75:14, 78:24, 79:24, 80:22, 81:18, 82:5, 84:17, 84:19, 85:3, 85:9, 87:17, 96:8, 97:1, 98:12, 98:14, 111:8, 112:7 Bureau's [38] - 20:17, 21:9, 21:17,</p>	<p>25:22, 34:21, 35:7, 35:13, 36:13, 37:8, 37:9, 37:18, 37:20, 46:5, 51:12, 51:18, 52:15, 52:17, 53:23, 56:6, 58:9, 58:11, 63:23, 64:24, 65:5, 69:3, 70:19, 77:3, 77:7, 80:5, 81:2, 93:6, 93:10, 95:17, 97:18, 101:17, 108:25, 110:24, 111:7 BUTCH [1] - 2:3 BY [9] - 23:5, 39:6, 53:15, 63:12, 71:15, 73:12, 115:10, 120:21, 155:12</p>
B				C
<p>bachelor [2] - 54:17, 64:5 bachelor's [2] - 23:17, 39:19 background [2] - 39:17, 147:2 bacteria [1] - 35:11 BAMMAN [1] - 165:25 BAMMAN [16] - 2:4, 114:16, 115:5, 115:8, 115:11, 115:22, 115:24, 156:14, 166:2, 166:7, 167:2, 167:4, 167:14, 167:22, 168:10, 168:25 base [2] - 162:21, 164:8 based [53] - 16:3, 19:24, 21:5, 22:14, 28:17, 34:8, 34:19, 34:21, 34:25, 35:2, 35:11, 37:22, 37:23, 43:13, 43:23, 45:6, 46:3, 48:7, 48:20, 49:19, 50:23, 52:10, 52:19, 56:5, 57:14,</p>				<p>Caliente [1] - 84:4 California [1] - 118:19 camping [1] - 88:3 cannot [3] - 20:20, 172:7, 173:20 Canyon [2] - 68:17 capabilities [1] - 22:4 capacities [1] - 24:9 capacity [1] - 71:21 Capitol [1] - 1:17 carefully [1] - 65:11 case [8] - 17:1, 20:25, 58:3, 59:12, 119:14, 126:12, 161:15, 168:21 cases [6] - 50:21, 59:9, 92:22, 118:21, 166:24, 168:7 CASTANEDA [1] - 15:6 catastrophic [1] - 161:17 categories [1] - 60:15 categorize [1] - 27:24 category [2] - 60:16, 163:2 caused [1] - 89:3 causes [1] - 29:23 caveat [1] - 173:14 CCR [1] - 177:19 cell [1] - 7:20 Celsius [1] - 30:5 Center [4] - 3:11, 10:19, 23:21, 23:23 ceremonial [1] -</p>

KATHY TOWNSEND COURT REPORTERS

110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

(505) 243-5018 - Fax (505) 243-3606

<p>76:16 certain [11] - 21:15, 21:19, 22:11, 61:20, 91:6, 97:24, 104:4, 109:1, 161:8, 173:9, 175:7 certainly [3] - 34:23, 107:21, 161:13 certification [1] - 44:19 certified [1] - 25:8 certify [1] - 177:5 certifying [1] - 47:8 cetera [2] - 155:24, 159:14 CFR [4] - 30:15, 30:22, 45:1, 97:25 Chair [1] - 2:3 chair [9] - 8:16, 14:12, 18:24, 73:4, 115:2, 115:5, 119:18, 120:11, 166:8 chairman [11] - 6:13, 114:6, 118:24, 120:12, 155:1, 155:20, 157:5, 159:6, 162:4, 163:10, 170:4 Chairman [1] - 161:6 challenge [1] - 112:7 challenging [1] - 169:3 Chama [1] - 84:21 chance [1] - 133:7 change [32] - 26:17, 31:9, 37:21, 47:5, 48:25, 59:7, 59:9, 64:19, 67:17, 70:19, 77:4, 79:23, 81:10, 87:6, 87:7, 87:17, 95:8, 101:7, 101:9, 101:16, 101:18, 111:16, 111:17, 111:18, 127:8, 127:25, 160:25, 167:20, 168:1, 168:2, 168:20, 173:16 changed [12] - 13:4, 43:21, 50:8, 50:19, 55:22, 65:14, 70:17, 73:15, 94:17, 102:12, 161:25 changes [50] - 8:18, 16:10, 16:24, 20:17, 21:14, 21:19, 26:2, 35:2, 35:14, 35:15, 37:2, 37:23, 37:25, 38:2, 38:5, 38:10, 40:19, 40:21, 40:24, 41:3, 41:7, 41:10, 42:4, 48:6, 48:15,</p>	<p>48:19, 49:3, 49:5, 52:9, 52:14, 53:3, 56:2, 59:2, 59:5, 61:17, 63:20, 65:24, 66:1, 66:2, 69:5, 70:7, 72:10, 92:15, 95:23, 97:8, 115:11, 115:12, 116:6, 169:1, 169:10 changing [4] - 26:15, 42:18, 143:22, 156:18 Chappelle [1] - 11:1 CHAPPELLE [4] - 3:3, 104:20, 113:20, 154:15 Chapter [1] - 19:7 characteristics [1] - 28:4 characterization [1] - 148:11 Chavez [2] - 1:16, 6:16 CHAVEZ [72] - 2:10, 2:11, 6:13, 10:4, 11:4, 13:1, 13:18, 14:2, 14:10, 14:22, 15:9, 16:2, 17:9, 17:25, 18:9, 18:20, 22:19, 38:20, 38:23, 72:19, 72:25, 73:2, 77:12, 77:22, 78:3, 100:2, 100:4, 100:10, 103:4, 103:9, 103:22, 104:8, 104:17, 104:19, 104:21, 105:5, 105:10, 105:12, 105:16, 106:2, 106:5, 106:13, 113:2, 113:6, 113:13, 113:19, 113:21, 113:23, 113:25, 114:4, 114:19, 114:23, 115:1, 119:18, 119:25, 120:5, 120:8, 120:10, 129:3, 129:13, 154:10, 154:14, 154:16, 154:20, 155:5, 161:3, 166:6, 170:4, 170:10, 172:12, 175:17, 176:2 check [2] - 87:19, 113:10 chemical [1] - 28:3 chemistry [1] - 64:6 Chevron [6] - 3:19, 10:21, 14:10, 104:10, 113:15, 154:12 Chevron's [1] - 17:5 chief [6] - 23:9, 23:13, 24:25, 25:13, 25:20, 71:19</p>	<p>Chief [2] - 21:8, 22:21 Chihuahuan [1] - 68:19 Chino [2] - 3:2, 21:13 chronic [9] - 145:4, 148:13, 148:20, 148:25, 150:6, 150:9, 150:10, 161:18 circulation [2] - 37:4, 58:10 circumstances [4] - 15:16, 20:6, 146:11, 146:20 citation [3] - 49:5, 105:2, 105:25 cited [3] - 16:13, 95:23, 98:12 citing [1] - 50:8 citizen [1] - 174:4 citizens [2] - 37:17, 171:10 clarification [4] - 15:18, 15:24, 105:12, 170:6 clarifications [3] - 45:20, 49:7, 134:11 clarified [2] - 32:11, 49:18 clarify [6] - 17:7, 48:17, 54:8, 141:12, 151:12, 164:25 clarity [2] - 98:17, 105:23 classification [2] - 11:19, 156:18 classified [1] - 95:1 classifying [1] - 162:8 Clean [41] - 19:11, 19:18, 20:13, 24:19, 25:10, 27:9, 27:11, 28:24, 30:7, 30:16, 31:18, 39:15, 40:2, 43:2, 44:18, 46:21, 47:9, 47:17, 47:19, 50:12, 53:6, 59:15, 60:17, 87:12, 116:11, 117:6, 142:23, 144:8, 145:7, 145:9, 145:16, 146:1, 148:1, 149:7, 152:19, 152:23, 153:5, 153:15, 156:4, 156:5, 171:4 cleanup [1] - 172:4 clear [23] - 13:19, 17:14, 22:6, 49:21, 96:19, 101:15, 102:19, 105:3, 111:21, 117:3,</p>	<p>120:19, 125:5, 127:24, 134:8, 135:9, 137:5, 138:11, 140:18, 143:3, 143:4, 144:15, 148:19, 152:3 climate [2] - 67:21, 173:16 closed [8] - 22:16, 51:20, 56:16, 58:18, 62:18, 62:24, 69:8, 160:22 closely [2] - 54:22, 63:24 closing [1] - 172:3 coastal [2] - 93:20 Code [3] - 19:8, 41:16, 66:2 codified [1] - 19:7 cold [6] - 67:17, 67:18, 68:6, 68:7, 68:11, 68:18 cold-water [4] - 67:17, 67:18, 68:11, 68:18 collect [4] - 34:9, 165:8, 165:16, 165:17 collection [1] - 53:24 collectively [1] - 60:14 column [1] - 99:18 combination [1] - 64:16 coming [1] - 11:13 Comment [3] - 5:3, 5:20, 5:22 comment [29] - 7:23, 8:3, 8:6, 8:13, 10:6, 10:9, 36:9, 37:22, 52:2, 54:3, 58:8, 58:18, 58:21, 58:22, 69:6, 69:7, 69:13, 136:7, 138:5, 138:8, 138:9, 155:3, 160:20, 170:1, 170:13, 170:23, 172:13, 172:19, 175:19 COMMENT [3] - 8:14, 170:24, 172:20 commentary [1] - 69:25 comments [26] - 8:2, 13:16, 18:5, 24:12, 37:10, 37:13, 37:18, 43:6, 48:7, 48:9, 52:10, 52:13, 58:13, 58:25, 59:3, 59:4, 65:12, 65:13, 69:18, 69:20, 69:22, 69:24, 70:10, 70:15, 104:16, 155:23</p>	<p>commercial [1] - 88:19 COMMISSION [4] - 1:2, 2:2, 115:10, 155:12 Commission [106] - 1:17, 2:8, 3:14, 5:16, 5:18, 6:4, 6:14, 6:17, 7:17, 9:8, 9:20, 10:16, 12:16, 16:16, 18:25, 19:16, 19:20, 19:22, 20:4, 20:11, 21:1, 31:14, 32:3, 32:6, 32:8, 32:18, 32:23, 35:1, 36:20, 41:8, 42:6, 43:17, 43:22, 44:12, 45:5, 45:11, 46:15, 46:19, 46:23, 48:17, 49:10, 49:20, 50:2, 50:6, 53:3, 53:4, 61:18, 66:9, 70:3, 70:4, 70:8, 73:4, 73:6, 86:9, 88:22, 90:2, 90:24, 91:5, 92:14, 95:7, 102:16, 102:22, 103:20, 104:12, 107:4, 107:23, 114:1, 114:6, 114:10, 114:13, 114:14, 115:2, 115:13, 115:21, 116:14, 116:19, 117:7, 117:12, 117:16, 117:18, 117:21, 118:3, 119:19, 119:21, 135:5, 135:6, 135:16, 135:17, 136:9, 136:14, 136:25, 137:14, 138:15, 140:25, 154:2, 154:23, 155:9, 166:5, 170:3, 170:5, 170:7, 171:1, 171:6, 172:5, 177:20 Commission's [7] - 37:8, 38:13, 50:4, 51:3, 52:21, 106:21, 110:14 Commissioner [6] - 155:11, 156:16, 157:4, 162:5, 163:12, 165:24 Commissioners [3] - 6:9, 120:12, 171:15 committed [1] - 44:9 Common [1] - 171:12 common [4] - 159:22, 171:16, 173:2, 175:15</p>
--	--	--	--	---

KATHY TOWNSEND COURT REPORTERS

110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

(505) 243-5018 - Fax (505) 243-3606

<p>commonly [3] - 19:2, 27:14, 30:10</p> <p>commonwealth [3] - 171:16, 172:2, 172:10</p> <p>communication [3] - 12:2, 12:21, 83:22</p> <p>communities [7] - 161:8, 161:10, 161:12, 161:14, 161:19, 161:20, 161:25</p> <p>Communities [1] - 171:4</p> <p>community [3] - 44:22, 68:21, 123:24</p> <p>Company [1] - 3:2</p> <p>compared [3] - 139:6, 140:3, 140:6</p> <p>compiled [1] - 32:22</p> <p>complete [2] - 55:6, 71:3</p> <p>completed [2] - 30:25, 160:15</p> <p>complex [1] - 172:24</p> <p>complexity [1] - 134:1</p> <p>compliance [23] - 25:4, 43:22, 47:14, 47:15, 50:16, 122:23, 123:8, 123:19, 124:3, 124:10, 124:13, 124:17, 124:23, 124:24, 125:7, 125:13, 125:25, 126:1, 126:4, 130:1, 130:7, 139:23, 142:14</p> <p>complies [1] - 47:16</p> <p>comply [7] - 26:20, 35:22, 124:10, 130:9, 132:15, 140:22, 141:4</p> <p>component [6] - 9:11, 55:5, 126:19, 134:8, 134:20, 135:19</p> <p>comports [1] - 101:20</p> <p>comprehensive [1] - 38:13</p> <p>concentrations [2] - 139:11, 140:2</p> <p>concept [1] - 31:21</p> <p>concern [9] - 15:9, 36:5, 70:9, 114:11, 146:8, 146:14, 173:5, 174:14, 175:2</p> <p>concerned [4] - 15:1, 174:6, 174:24, 175:4</p> <p>concerning [4] - 58:16, 95:24, 118:13, 118:14</p> <p>concerns [12] -</p>	<p>24:12, 40:19, 48:13, 56:9, 56:14, 58:22, 145:18, 146:5, 173:7, 173:17, 173:22, 175:14</p> <p>concluded [3] - 53:9, 60:2, 62:4</p> <p>concludes [3] - 38:17, 71:10, 72:18</p> <p>conclusion [4] - 20:10, 57:15, 80:15, 175:20</p> <p>conclusions [7] - 51:22, 56:4, 62:12, 62:22, 63:3, 71:4, 162:7</p> <p>concrete [1] - 126:21</p> <p>concur [1] - 9:19</p> <p>concur [1] - 51:21</p> <p>condition [3] - 100:20, 135:24, 167:6</p> <p>conditions [15] - 43:15, 44:22, 48:4, 59:18, 61:22, 97:24, 132:20, 138:23, 141:1, 148:14, 162:7, 162:14, 162:24, 165:3, 165:18</p> <p>conduct [7] - 6:18, 7:2, 13:8, 19:1, 35:4, 36:21, 160:4</p> <p>conductance [3] - 66:25, 67:2, 67:7</p> <p>conducted [8] - 6:24, 24:11, 25:4, 31:4, 33:3, 34:11, 35:22, 35:25</p> <p>conducting [3] - 24:17, 31:8, 32:15</p> <p>conducts [1] - 71:25</p> <p>conferred [1] - 151:3</p> <p>confirm [1] - 77:22</p> <p>confirmed [1] - 68:1</p> <p>conflict [2] - 116:10, 117:11</p> <p>Congress [2] - 117:3, 117:10</p> <p>congressional [1] - 116:9</p> <p>connected [1] - 160:24</p> <p>Consequences [1] - 156:24</p> <p>conservation [1] - 37:15</p> <p>Conservation [1] - 70:2</p> <p>consider [4] - 42:22, 66:19, 134:14, 150:16</p> <p>considerable [1] -</p>	<p>76:13</p> <p>consideration [4] - 36:5, 43:7, 125:3, 175:14</p> <p>considered [2] - 42:24, 153:4</p> <p>consist [1] - 35:24</p> <p>consistent [14] - 31:18, 43:3, 45:9, 45:18, 49:8, 49:11, 51:2, 87:11, 97:2, 111:1, 111:11, 111:13, 121:16, 155:25</p> <p>consolidates [1] - 38:10</p> <p>constraint [1] - 133:10</p> <p>consultation [2] - 137:17, 137:19</p> <p>consuming [1] - 9:21</p> <p>contact [96] - 26:17, 28:12, 30:21, 31:15, 32:12, 33:18, 33:23, 34:2, 34:5, 34:16, 34:22, 35:12, 58:1, 60:4, 60:21, 61:4, 73:16, 73:21, 74:7, 74:14, 74:19, 75:1, 75:10, 75:17, 75:22, 76:2, 76:6, 76:11, 76:15, 76:17, 76:24, 79:1, 79:10, 80:1, 80:16, 80:25, 81:22, 82:7, 85:19, 86:10, 86:16, 86:21, 87:3, 87:10, 87:12, 87:13, 87:14, 88:13, 88:16, 88:20, 88:23, 89:11, 89:22, 90:5, 90:9, 90:17, 91:7, 91:17, 92:15, 92:16, 92:20, 92:22, 93:1, 93:9, 93:21, 93:25, 94:4, 94:13, 94:23, 107:6, 107:17, 107:24, 108:7, 109:2, 110:19, 110:25, 111:9, 112:22, 152:9, 152:14, 152:23, 153:3, 153:4, 153:10, 153:17, 153:19, 153:22, 154:4, 159:18, 159:24, 160:2, 160:8, 160:10</p> <p>Contact [1] - 111:6</p> <p>contact' [2] - 76:9, 88:15</p> <p>contacted [1] - 35:13</p> <p>contain [1] - 77:20</p>	<p>contained [1] - 41:13</p> <p>contest [1] - 41:25</p> <p>context [3] - 18:6, 84:11, 148:24</p> <p>continue [4] - 100:7, 103:14, 166:6, 175:22</p> <p>CONTINUED [2] - 3:1, 4:1</p> <p>CONTROL [2] - 1:2, 2:2</p> <p>control [4] - 19:17, 40:1, 53:23, 146:24</p> <p>Control [9] - 1:16, 6:4, 19:16, 86:9, 90:24, 91:5, 92:13, 107:4, 171:1</p> <p>conversations [2] - 151:9, 151:11</p> <p>convictions [1] - 174:13</p> <p>cool [4] - 67:18, 67:24, 68:20, 162:1</p> <p>cool-water [4] - 67:18, 67:24, 68:20, 162:1</p> <p>Cooney [1] - 68:17</p> <p>coordinator [2] - 21:10, 39:10</p> <p>copies [4] - 69:15, 98:22, 99:21, 100:1</p> <p>copy [6] - 7:15, 78:13, 98:4, 99:2, 99:9, 99:24</p> <p>Corps [1] - 158:9</p> <p>Corrales [1] - 3:17</p> <p>Correct [1] - 102:13</p> <p>correct [138] - 20:19, 20:20, 26:6, 34:4, 72:14, 74:10, 74:15, 75:23, 76:3, 76:4, 76:24, 76:25, 77:24, 79:2, 79:18, 80:3, 82:23, 83:14, 83:25, 84:16, 84:23, 85:2, 85:11, 85:12, 85:15, 85:16, 86:4, 86:10, 86:17, 86:18, 87:4, 87:18, 87:22, 88:24, 89:12, 89:22, 89:23, 90:14, 90:18, 90:20, 90:21, 90:25, 91:8, 92:11, 92:18, 92:22, 93:25, 94:5, 94:6, 95:9, 95:14, 95:25, 96:7, 96:11, 96:24, 96:25, 97:3, 97:5, 97:9, 97:16, 97:23, 98:2, 98:15, 98:16, 98:20, 100:24, 100:25, 101:4, 101:5,</p>	<p>101:9, 101:19, 101:21, 101:22, 102:4, 102:9, 102:10, 102:14, 106:12, 106:23, 107:6, 107:7, 107:10, 107:12, 107:18, 107:25, 108:3, 108:10, 108:16, 108:21, 109:3, 109:6, 109:24, 110:15, 110:20, 111:2, 112:23, 112:24, 121:13, 122:8, 126:2, 127:13, 130:2, 131:7, 131:8, 133:1, 133:23, 135:13, 136:17, 137:11, 138:23, 138:24, 139:3, 139:4, 139:25, 142:21, 143:13, 144:11, 144:12, 144:22, 144:23, 146:3, 148:8, 148:9, 149:8, 149:9, 149:13, 149:14, 150:13, 150:14, 152:15, 152:16, 152:20, 153:7, 153:13, 154:1, 160:15, 166:24</p> <p>corrected [1] - 50:6</p> <p>corrections [2] - 40:14, 69:21</p> <p>correctly [1] - 77:19</p> <p>corresponding [1] - 87:14</p> <p>cost [1] - 10:2</p> <p>costs [1] - 9:21</p> <p>council [1] - 8:16</p> <p>Council [1] - 8:16</p> <p>Counsel [5] - 2:8, 4:8, 38:20, 77:22, 100:4</p> <p>counsel [5] - 10:10, 120:14, 166:18, 177:10, 177:13</p> <p>Counsels [1] - 2:17</p> <p>COUNTY [1] - 177:3</p> <p>couple [1] - 159:8</p> <p>course [3] - 82:18, 127:2, 162:14</p> <p>Court [1] - 7:14</p> <p>court [2] - 7:15, 156:11</p> <p>cover [2] - 140:10, 157:9</p> <p>covered [5] - 9:10, 9:15, 115:14, 115:17, 117:2</p> <p>crafted [2] - 121:2,</p>
---	--	---	--	---

KATHY TOWNSEND COURT REPORTERS

110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

(505) 243-5018 - Fax (505) 243-3606

<p>139:2 created [1] - 151:19 credibility [1] - 7:10 credible [3] - 19:24, 45:6, 90:2 Creek [1] - 86:14 Criteria [1] - 24:13 criteria [85] - 22:14, 26:13, 27:21, 28:9, 29:7, 29:10, 29:14, 29:15, 29:19, 30:1, 33:18, 33:23, 35:11, 42:18, 42:20, 43:20, 48:22, 48:25, 50:14, 50:15, 52:22, 57:20, 58:4, 59:7, 59:11, 60:17, 60:18, 60:22, 61:4, 61:13, 61:17, 62:4, 66:20, 66:25, 67:7, 67:8, 87:15, 93:19, 93:23, 101:9, 102:7, 102:9, 102:13, 121:23, 122:7, 122:10, 122:12, 122:24, 123:7, 124:11, 124:25, 126:9, 126:13, 126:22, 126:24, 126:25, 127:8, 131:2, 134:18, 144:1, 145:1, 145:4, 145:17, 145:18, 145:23, 145:25, 147:16, 147:21, 148:1, 148:6, 148:16, 148:17, 149:1, 149:5, 149:11, 149:18, 150:24, 151:4, 151:14, 151:18, 159:25, 166:20, 168:17 criterion [13] - 29:21, 30:4, 48:22, 50:20, 100:18, 100:24, 141:16, 149:12, 150:10, 151:24, 166:15, 166:22 critical [2] - 17:1, 49:17 crop [1] - 39:21 cross [20] - 7:7, 7:10, 13:25, 21:20, 21:24, 38:21, 72:20, 72:22, 73:7, 100:5, 103:14, 114:12, 120:23, 128:21, 129:1, 154:11, 154:14, 154:15, 154:24, 175:23 Cross [4] - 5:15, 5:16, 5:17, 5:18</p>	<p>CROSS [4] - 73:12, 115:10, 120:21, 155:12 cross-examination [9] - 21:20, 21:24, 38:21, 72:20, 72:22, 73:7, 120:23, 154:11, 175:23 cross-examine [2] - 128:21, 129:1 cross-examining [1] - 13:25 Cruces [1] - 37:6 cultural [1] - 76:16 cumulative [2] - 174:16, 174:19 curious [1] - 142:25 current [11] - 9:7, 23:6, 31:22, 32:24, 38:13, 39:8, 39:12, 66:6, 67:14, 116:20, 118:14 cycle [1] - 169:16 cycling [2] - 64:8, 64:19</p>	<p>94:19, 105:8, 149:16 dates [1] - 160:17 days [2] - 36:4, 36:9 de [3] - 3:5, 3:22, 4:5 deadlines [2] - 12:17, 12:20 deal [3] - 12:22, 14:16, 116:3 dealing [8] - 17:12, 121:17, 171:6, 172:24, 172:25, 173:1, 173:2, 173:11 deals [1] - 117:10 dear [1] - 170:25 Debbie [3] - 55:18, 62:20, 65:11 decades [3] - 74:4, 92:22, 93:4 December [4] - 69:9, 69:10, 149:16, 160:22 decided [1] - 18:10 deciding [1] - 17:20 decision [22] - 18:12, 20:11, 31:16, 32:7, 32:10, 91:10, 106:21, 109:23, 109:24, 110:3, 110:8, 110:9, 110:10, 110:18, 110:21, 111:23, 112:7, 160:5, 166:23, 174:25 deck [1] - 120:19 dedicated [1] - 64:17 deems [1] - 20:5 default [1] - 31:15 defenders [1] - 172:9 deficit [1] - 162:17 deficits [1] - 164:6 define [2] - 27:18, 28:7 defined [4] - 8:25, 28:1, 28:22, 79:11 defines [2] - 121:10, 121:11 definite [1] - 134:15 definitely [2] - 156:6, 165:5 definition [19] - 76:5, 76:23, 81:21, 81:22, 86:6, 88:12, 99:15, 100:13, 100:16, 100:22, 101:24, 101:25, 156:11, 157:11, 158:2, 158:4, 159:1, 164:16, 164:20 definitions [1] - 89:20 deg [2] - 128:1, 141:18</p>	<p>degradation [4] - 140:15, 141:21, 141:25, 142:15 degree [8] - 23:17, 23:18, 39:19, 39:20, 42:14, 54:17, 64:5, 157:16 degrees [2] - 30:5 Deke [1] - 17:3 Del [1] - 3:11 demand [1] - 172:2 demanding [1] - 75:9 demonstrate [4] - 30:25, 32:3, 51:22, 154:5 demonstrated [6] - 31:25, 61:19, 67:11, 67:14, 108:19, 168:6 demonstrates [1] - 30:13 demonstration [4] - 59:6, 59:11, 59:14, 142:14 deny [1] - 44:18 DEPARTMENT [1] - 2:15 Department [74] - 4:2, 6:22, 8:19, 10:14, 11:13, 11:17, 12:5, 15:25, 21:3, 21:23, 21:25, 22:20, 23:20, 26:21, 34:1, 34:13, 34:25, 35:4, 35:21, 37:10, 37:21, 38:4, 39:11, 39:24, 44:18, 50:7, 51:18, 54:10, 63:16, 64:10, 64:13, 71:19, 72:13, 73:20, 75:8, 75:13, 77:16, 83:12, 83:17, 83:20, 85:14, 87:8, 101:6, 101:10, 101:24, 102:11, 103:18, 104:15, 106:11, 113:8, 116:4, 117:12, 120:16, 122:22, 123:5, 124:21, 124:22, 124:23, 128:22, 134:19, 136:7, 138:1, 138:8, 143:21, 149:16, 150:15, 150:18, 151:2, 151:19, 152:7, 153:23, 159:15, 159:18, 172:6 Department's [33] - 22:8, 22:17, 23:10, 26:16, 38:8, 38:12, 39:1, 40:7, 40:13, 40:20, 41:14, 46:13,</p>	<p>53:21, 77:9, 78:12, 78:21, 79:21, 80:10, 81:24, 82:21, 101:1, 101:14, 120:25, 121:3, 121:15, 124:2, 127:10, 144:2, 144:3, 144:10, 144:25, 146:5, 152:8 Departmental [1] - 84:10 dependent [2] - 150:7, 150:11 DeRose [17] - 2:4, 114:16, 115:5, 115:8, 115:11, 115:22, 115:24, 156:14, 165:25, 166:2, 166:7, 167:2, 167:4, 167:14, 167:22, 168:10, 168:25 DeRose-Bamman [17] - 2:4, 114:16, 115:5, 115:8, 115:11, 115:22, 115:24, 156:14, 165:25, 166:2, 166:7, 167:2, 167:4, 167:14, 167:22, 168:10, 168:25 describe [9] - 26:19, 39:16, 40:22, 45:25, 47:18, 51:14, 54:14, 64:3, 66:8 described [5] - 31:6, 33:15, 38:2, 46:4, 127:15 describing [2] - 83:13, 165:1 description [1] - 66:11 descriptions [1] - 66:18 designate [3] - 28:16, 73:20, 92:19 Designated [1] - 101:2 designated [64] - 6:17, 21:9, 26:13, 26:15, 27:16, 27:19, 28:7, 28:8, 28:12, 29:5, 29:8, 29:12, 29:24, 30:2, 30:8, 30:23, 31:12, 32:2, 32:5, 32:24, 33:18, 35:1, 35:12, 50:15, 56:19, 59:10, 60:9, 60:16, 61:13, 61:21, 67:15, 71:5, 73:16, 73:21, 73:24, 74:7, 74:13, 74:20, 75:1,</p>
D				
	<p>Dail [7] - 21:16, 22:23, 63:13, 63:14, 67:10, 82:16, 83:15 DAIL [28] - 63:8, 82:14, 82:16, 82:18, 82:23, 83:15, 83:22, 84:1, 84:7, 84:10, 85:20, 86:2, 86:5, 86:11, 86:18, 86:22, 105:15, 146:8, 147:3, 147:10, 147:18, 154:1, 160:13, 160:17, 160:20, 161:2, 161:6, 162:10 Dail's [1] - 31:10 daily [1] - 24:6 dairy [1] - 39:19 Dalva [1] - 10:24 DALVA [1] - 3:3 dam [1] - 49:13 data [20] - 19:24, 24:19, 32:22, 34:11, 45:6, 45:10, 53:24, 54:2, 63:19, 64:1, 67:1, 68:8, 70:5, 70:8, 90:2, 165:9, 165:16, 165:17, 171:21 date [6] - 37:2, 38:5, 41:7, 82:12, 93:1, 93:3 dated [4] - 52:15,</p>			

KATHY TOWNSEND COURT REPORTERS

110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

(505) 243-5018 - Fax (505) 243-3606

<p>86:9, 87:13, 90:14, 91:17, 92:15, 92:21, 93:21, 93:24, 93:25, 94:3, 94:4, 97:15, 100:18, 100:24, 101:8, 101:15, 101:16, 101:18, 107:4, 107:23, 110:19, 112:15, 112:21, 152:8, 168:1</p> <p>designating [4] - 27:19, 90:25, 91:6, 94:12</p> <p>designation [6] - 74:25, 91:21, 106:22, 108:5, 111:14, 152:22</p> <p>designations [7] - 74:15, 94:23, 94:25, 95:8, 95:9, 95:13, 107:16</p> <p>detail [3] - 32:21, 40:23, 51:15</p> <p>detailed [1] - 49:3</p> <p>details [2] - 14:21, 38:1</p> <p>determination [7] - 60:8, 61:14, 80:11, 90:22, 157:19, 158:9, 158:10</p> <p>determine [10] - 33:8, 33:20, 56:18, 59:21, 112:14, 127:7, 132:1, 163:16, 165:9, 165:12</p> <p>determined [5] - 31:17, 67:5, 88:22, 111:12, 145:25</p> <p>determining [1] - 118:4</p> <p>detrimental [1] - 44:21</p> <p>developed [8] - 32:13, 56:22, 57:3, 59:13, 85:22, 112:13, 151:16, 163:20</p> <p>developing [6] - 24:20, 36:1, 39:13, 40:3, 44:9, 50:19</p> <p>development [6] - 26:22, 53:25, 54:23, 63:20, 68:24, 137:13</p> <p>Development [1] - 24:13</p> <p>DIAL [1] - 5:11</p> <p>difference [5] - 117:15, 142:9, 142:11, 157:6, 157:15</p> <p>different [9] - 42:17, 43:25, 60:21, 66:19, 66:24, 117:13, 142:4,</p>	<p>166:16, 168:14</p> <p>dire [1] - 17:21</p> <p>Direct [5] - 5:6, 5:8, 5:10, 5:12, 5:14</p> <p>DIRECT [5] - 23:4, 39:5, 53:14, 63:11, 71:14</p> <p>direct [39] - 25:25, 26:2, 33:15, 34:15, 38:17, 40:12, 42:1, 49:4, 55:16, 56:8, 56:14, 65:10, 72:18, 73:18, 77:4, 77:6, 78:8, 78:22, 79:6, 79:16, 81:11, 82:25, 83:6, 91:24, 92:2, 92:7, 93:7, 95:22, 106:17, 109:10, 109:11, 121:20, 121:25, 122:4, 123:2, 129:10, 129:11, 129:24, 148:3</p> <p>directed [3] - 73:8, 120:23, 128:15</p> <p>directly [6] - 7:15, 16:9, 16:17, 55:21, 76:7, 104:3</p> <p>director [1] - 173:4</p> <p>disagreed [1] - 110:13</p> <p>disapproval [4] - 94:16, 144:9, 144:14, 150:2</p> <p>disapproved [2] - 20:24, 144:5</p> <p>disapproving [1] - 147:25</p> <p>discharge [15] - 25:7, 28:5, 35:9, 40:5, 128:11, 129:17, 129:22, 130:6, 131:17, 132:12, 140:19, 141:11, 141:13, 142:8, 174:15</p> <p>Discharge [4] - 25:8, 35:16, 43:14, 56:10</p> <p>discharger [1] - 141:3</p> <p>dischargers [6] - 130:11, 130:23, 130:25, 132:24, 141:18, 142:7</p> <p>discharges [9] - 127:11, 127:17, 127:22, 128:19, 139:11, 140:9, 141:8, 146:25, 174:16</p> <p>discretionary [1] - 117:18</p> <p>discuss [6] - 26:16,</p>	<p>41:14, 41:20, 48:13, 69:11, 166:14</p> <p>discussed [2] - 43:19, 134:12</p> <p>discussing [1] - 103:18</p> <p>discussion [5] - 36:8, 106:18, 129:6, 138:5, 169:5</p> <p>discussions [5] - 48:15, 48:20, 124:7, 167:23, 169:1</p> <p>dissolved [1] - 146:12</p> <p>distinctions [1] - 141:24</p> <p>distinguish [4] - 56:22, 57:1, 60:23, 159:16</p> <p>distinguishing [3] - 57:4, 61:9, 61:12</p> <p>distribute [1] - 100:1</p> <p>District [1] - 70:3</p> <p>districts [1] - 37:15</p> <p>disturbance [1] - 64:19</p> <p>divided [1] - 161:10</p> <p>diving [1] - 34:16</p> <p>djm@gknet.com [1] - 3:7</p> <p>docketed [1] - 6:22</p> <p>Doctrine [1] - 171:11</p> <p>document [21] - 15:21, 15:22, 16:12, 16:13, 16:18, 16:19, 38:4, 41:6, 56:22, 57:8, 59:22, 71:3, 77:18, 83:23, 94:2, 104:3, 104:6, 105:2, 105:3, 105:13, 148:16</p> <p>documentation [7] - 57:5, 60:25, 61:15, 70:21, 85:14, 95:2, 130:18</p> <p>documented [1] - 34:15</p> <p>documenting [1] - 61:2</p> <p>documents [3] - 24:10, 39:15, 85:20</p> <p>Dolan [1] - 154:17</p> <p>DOLAN [2] - 4:7, 154:17</p> <p>DOMINGUEZ [28] - 2:3, 6:1, 103:7, 114:3, 114:18, 115:7, 116:1, 117:25, 118:5, 118:25, 119:20, 120:1, 122:14, 155:8, 156:16, 157:4, 159:8,</p>	<p>160:11, 160:14, 160:18, 160:23, 162:3, 162:5, 163:12, 165:23, 166:3, 169:24, 170:9</p> <p>done [3] - 44:10, 100:5, 108:24</p> <p>down [4] - 9:22, 164:15, 172:3, 172:15</p> <p>downgrade [5] - 44:7, 90:17, 92:17, 106:19, 109:1</p> <p>downgrading [1] - 50:19</p> <p>downstream [4] - 68:17, 86:16, 86:25, 87:21</p> <p>downward [1] - 139:23</p> <p>Dr [10] - 17:3, 17:5, 23:14, 24:24, 25:21, 25:25, 26:5, 31:10, 63:13, 67:10</p> <p>draft [19] - 25:6, 36:8, 36:11, 48:6, 52:6, 69:1, 69:6, 69:7, 69:11, 69:12, 69:14, 110:2, 110:9, 117:11, 117:20, 137:25, 138:4, 155:16, 160:21</p> <p>Draft [1] - 110:5</p> <p>drafted [3] - 166:17, 169:7, 169:20</p> <p>drafting [2] - 40:5, 42:23</p> <p>drafts [1] - 69:1</p> <p>drainages [3] - 21:13, 52:5, 52:18</p> <p>draw [1] - 11:9</p> <p>dredge [3] - 44:20, 47:10, 142:24</p> <p>drew [1] - 91:5</p> <p>Drive [1] - 2:17</p> <p>drive [1] - 67:22</p> <p>driven [1] - 157:20</p> <p>drives [1] - 146:18</p> <p>driving [1] - 122:5</p> <p>drought [12] - 162:6, 162:14, 162:19, 162:20, 162:24, 162:25, 163:1, 163:7, 163:16, 164:5, 165:4</p> <p>droughts [1] - 173:7</p> <p>dry [2] - 119:12, 158:3</p> <p>due [2] - 61:21, 161:1</p> <p>duly [9] - 8:12, 23:2, 39:3, 53:12, 63:9, 71:12, 170:22,</p>	<p>172:18, 177:7</p> <p>duplicative [2] - 9:9, 9:14</p> <p>during [16] - 11:2, 24:22, 31:13, 33:12, 33:16, 36:20, 37:13, 44:8, 69:13, 91:4, 94:20, 100:20, 107:3, 107:22, 108:25, 110:23</p> <p>duties [1] - 39:13</p> <p>duty [2] - 171:13, 171:15</p> <p style="text-align: center;">E</p> <p>e-mail [3] - 15:7, 36:13, 69:3</p> <p>e-mailed [1] - 69:2</p> <p>early [2] - 95:13, 96:3</p> <p>Earth [1] - 171:4</p> <p>easier [1] - 107:1</p> <p>easily [1] - 173:10</p> <p>eco [2] - 68:16, 68:19</p> <p>eco-regional [2] - 68:16, 68:19</p> <p>ecological [1] - 68:8</p> <p>economic [3] - 44:22, 168:23, 169:2</p> <p>economically [1] - 123:24</p> <p>economics [1] - 173:17</p> <p>edits [1] - 70:11</p> <p>education [3] - 23:15, 54:15, 64:3</p> <p>educational [1] - 39:17</p> <p>EDWARD [1] - 2:6</p> <p>effect [4] - 96:6, 96:9, 102:23, 162:7</p> <p>effective [2] - 8:22, 27:5</p> <p>effectively [5] - 11:12, 13:21, 31:23, 121:4, 153:23</p> <p>effects [1] - 174:16</p> <p>effluent [5] - 46:9, 139:1, 139:6, 139:9, 140:3</p> <p>efforts [1] - 44:21</p> <p>eight [2] - 102:6, 149:22</p> <p>either [8] - 58:13, 76:1, 79:4, 88:10, 89:17, 95:8, 150:8, 162:17</p> <p>elected [1] - 96:8</p> <p>elements [2] - 42:24,</p>
--	--	--	--	--

KATHY TOWNSEND COURT REPORTERS

110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

(505) 243-5018 - Fax (505) 243-3606

<p>117:13 eligible [1] - 59:15 Elimination [4] - 25:9, 35:16, 43:14, 56:11 elsewhere [1] - 34:18 emergency [1] - 174:9 emitted [1] - 174:15 emphasis [2] - 64:8, 64:18 emphasized [1] - 31:22 employed [5] - 53:19, 55:19, 63:15, 177:11, 177:14 employee [3] - 55:18, 65:11, 177:13 encompass [4] - 137:23, 142:23, 143:22, 157:14 encompasses [1] - 149:10 encourage [1] - 124:21 end [7] - 10:8, 110:4, 113:12, 122:13, 141:15, 141:17, 155:4 ending [1] - 36:9 Energy [3] - 4:2, 11:10, 64:10 enforceable [7] - 43:5, 47:21, 47:25, 48:4, 138:23, 143:11, 143:15 engineering [1] - 54:18 English [1] - 37:3 enhance [3] - 20:2, 27:2, 27:8 ensure [5] - 29:11, 29:17, 54:5, 130:6, 141:12 enter [2] - 10:11, 98:22 entered [2] - 8:1, 13:20 entire [1] - 67:8 entities [6] - 37:16, 51:17, 122:22, 123:4, 123:10, 169:21 entitled [2] - 128:21, 128:25 entity [2] - 140:19, 167:5 environment [4] - 9:5, 10:3, 28:10, 159:24 ENVIRONMENT [1] -</p>	<p>2:15 Environment [14] - 6:22, 10:14, 11:13, 12:5, 21:3, 23:9, 53:20, 54:9, 63:16, 72:13, 75:7, 77:16, 116:4, 172:6 environmental [6] - 21:16, 39:25, 54:18, 63:15, 64:19, 166:12 Environmental [4] - 3:11, 10:18, 20:14, 39:24 EPA [107] - 9:11, 15:22, 16:12, 20:16, 20:17, 20:20, 20:24, 25:5, 27:10, 30:9, 31:16, 31:21, 35:15, 37:14, 43:6, 44:5, 45:9, 45:14, 46:20, 47:7, 47:13, 48:3, 48:16, 49:15, 52:25, 53:4, 61:18, 61:20, 61:24, 62:2, 62:4, 70:10, 70:13, 70:23, 71:2, 74:14, 74:18, 75:8, 75:12, 87:11, 90:11, 90:12, 90:22, 91:5, 91:15, 93:9, 93:17, 93:18, 93:23, 94:11, 94:15, 94:18, 94:21, 94:24, 95:12, 96:10, 96:13, 96:16, 96:18, 97:3, 99:6, 99:15, 102:6, 102:17, 102:19, 103:17, 104:2, 107:8, 107:15, 108:13, 109:22, 110:13, 110:18, 111:12, 111:16, 111:23, 112:7, 112:9, 116:8, 121:4, 121:6, 121:10, 121:16, 123:13, 123:18, 124:7, 130:12, 130:17, 134:10, 134:14, 144:5, 145:3, 147:16, 148:18, 149:3, 149:15, 150:1, 150:2, 150:23, 151:3, 152:18, 153:9, 154:4, 155:15, 174:3 EPA's [25] - 22:13, 31:22, 32:6, 32:10, 45:19, 49:6, 53:1, 94:20, 95:6, 95:23, 96:18, 97:7, 101:20, 101:25, 106:20, 109:17, 112:8, 124:9, 144:9, 144:14,</p>	<p>145:15, 147:25, 148:5, 148:24, 155:25 EPA-approved [1] - 47:13 EPA-issued [1] - 35:15 ephemeral [47] - 21:13, 22:11, 31:15, 32:13, 41:22, 51:13, 51:23, 52:5, 52:18, 52:22, 56:23, 57:1, 58:16, 59:17, 60:3, 60:20, 60:24, 61:10, 61:22, 62:5, 62:10, 62:13, 62:19, 63:1, 63:4, 74:25, 90:13, 90:19, 106:20, 106:23, 107:5, 108:2, 108:5, 111:1, 111:10, 111:14, 112:15, 112:20, 157:23, 158:2, 158:5, 158:11, 162:9, 164:17, 164:18, 164:24, 165:13 equal [1] - 150:5 equation [4] - 144:6, 150:3, 150:7, 150:11 ERIK [1] - 3:10 Erik [1] - 10:17 eriksg@westernlaw.org [1] - 3:13 error [2] - 66:3, 66:10 especially [1] - 134:15 essential [1] - 26:10 essentially [3] - 13:10, 72:9, 117:23 establish [4] - 30:9, 57:12, 57:20, 112:14 established [1] - 108:14 establishes [1] - 31:23 establishing [2] - 26:15, 27:22 estimated [1] - 114:12 et [2] - 155:24, 159:14 ethical [1] - 174:12 ethics [1] - 175:15 evaluate [5] - 91:22, 160:4, 165:3, 165:7, 165:15 evaluation [1] - 25:4 event [1] - 161:17 evidence [41] - 9:3,</p>	<p>19:24, 34:5, 34:8, 34:15, 34:25, 45:7, 45:10, 62:13, 67:16, 78:24, 79:9, 79:25, 80:6, 80:7, 80:12, 80:17, 81:6, 81:14, 81:23, 82:6, 82:7, 83:20, 83:24, 84:14, 85:10, 85:13, 85:18, 85:19, 86:19, 87:8, 89:10, 90:3, 90:4, 91:15, 91:21, 92:1, 153:16, 153:18, 153:21, 160:7 evidentiary [1] - 153:23 exacerbate [1] - 147:1 exact [1] - 150:25 exactly [2] - 93:3, 106:5 examination [11] - 7:8, 7:11, 21:20, 21:24, 38:21, 72:20, 72:22, 73:7, 120:23, 154:11, 175:23 Examination [9] - 5:6, 5:8, 5:10, 5:12, 5:14, 5:15, 5:16, 5:17, 5:18 EXAMINATION [9] - 23:4, 39:5, 53:14, 63:11, 71:14, 73:12, 115:10, 120:21, 155:12 examine [2] - 128:21, 129:1 examined [6] - 23:3, 39:4, 53:13, 63:10, 71:13, 73:11 examining [1] - 13:25 example [16] - 29:20, 30:3, 31:8, 32:16, 67:21, 71:25, 79:4, 79:7, 79:22, 81:11, 122:23, 123:7, 137:25, 138:6, 157:8, 168:23 examples [2] - 126:8, 126:21 exceeded [1] - 153:23 excluded [1] - 104:6 excludes [2] - 133:22, 143:18 excuse [1] - 135:22 excused [3] - 120:4, 120:8, 170:15 executive [1] - 173:4</p>	<p>exempted [1] - 29:16 exhibit [20] - 12:4, 12:11, 16:15, 16:16, 17:12, 17:13, 28:3, 78:6, 78:7, 78:11, 78:13, 82:3, 98:10, 98:14, 98:22, 103:21, 104:13, 106:1, 149:20 Exhibit [35] - 25:16, 25:23, 40:8, 40:13, 46:6, 52:16, 55:7, 55:11, 55:12, 55:14, 55:16, 62:25, 64:23, 64:24, 65:5, 65:9, 65:18, 65:19, 66:22, 77:7, 78:7, 78:14, 81:25, 82:6, 82:11, 83:10, 92:11, 92:25, 93:10, 93:13, 109:13, 149:17, 149:21, 160:18 Exhibits [1] - 37:20 exhibits [11] - 14:25, 15:19, 17:12, 17:18, 17:19, 17:22, 91:25, 104:1, 105:20, 128:15, 151:11 existed [1] - 140:4 existing [37] - 28:22, 29:4, 29:24, 31:1, 34:6, 34:17, 34:23, 42:16, 57:6, 57:14, 57:16, 57:21, 59:22, 59:23, 60:25, 61:1, 61:14, 61:15, 63:21, 76:3, 78:25, 79:11, 80:1, 80:12, 85:19, 86:7, 87:3, 87:10, 91:23, 123:25, 140:11, 152:24, 153:4, 153:12, 160:9 expansion [1] - 140:11 expect [3] - 20:16, 138:4, 139:17 expected [1] - 33:11 experience [6] - 23:16, 34:21, 39:18, 40:3, 54:14, 64:4 expert [2] - 14:6, 14:18 experts [1] - 17:3 Expires [2] - 177:19, 177:20 explain [3] - 26:12, 142:25, 157:6 explanation [1] - 36:24 explicit [1] - 138:12 explicitly [1] -</p>
--	--	--	--	---

KATHY TOWNSEND COURT REPORTERS

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<p>136:14 exploring [1] - 168:13 express [1] - 72:9 expressing [3] - 58:19, 58:21, 58:22 extending [1] - 120:15 extensions [1] - 50:7 extensive [1] - 35:25 external [1] - 28:5 extra [4] - 9:7, 9:19, 9:20, 9:21 extractive [1] - 173:1</p>	<p>far [6] - 74:16, 74:21, 87:23, 116:14, 116:17, 157:7 Farmington [1] - 69:10 faster [1] - 10:1 faulty [1] - 171:21 Fe [7] - 1:18, 2:18, 3:6, 3:22, 4:5, 37:5 feasibility [1] - 168:13 feasible [9] - 29:2, 42:15, 43:13, 44:16, 61:21, 123:15, 123:24, 124:16, 126:17 February [1] - 52:8 Federal [2] - 98:8, 105:7 federal [40] - 9:16, 19:10, 19:18, 20:13, 27:5, 28:21, 28:25, 30:9, 30:14, 30:22, 33:6, 43:3, 44:4, 44:19, 44:25, 47:6, 47:8, 47:9, 47:16, 47:23, 48:10, 49:8, 49:11, 51:2, 54:2, 95:23, 101:11, 108:14, 115:19, 117:2, 137:20, 143:2, 143:5, 144:8, 145:7, 145:16, 146:1, 148:1, 156:5 federally [2] - 25:5, 25:8 feedback [1] - 61:25 felt [2] - 16:16, 144:19 few [1] - 73:7 field [5] - 34:12, 163:19, 165:2, 165:8 FIFRA [2] - 116:11, 117:6 file [1] - 46:14 filed [21] - 6:21, 11:16, 12:12, 12:13, 25:22, 38:9, 40:7, 40:12, 41:1, 41:4, 41:7, 48:14, 49:21, 55:10, 55:24, 64:22, 65:5, 66:22, 70:18, 77:5, 83:2 filing [6] - 11:24, 12:18, 38:12, 40:17, 77:16, 98:13 filings [1] - 11:9 fill [3] - 44:20, 47:10, 142:24 final [17] - 20:11,</p>	<p>49:6, 51:21, 52:14, 52:20, 53:5, 70:11, 71:1, 97:3, 97:7, 98:18, 98:19, 99:21, 105:18, 110:10, 155:16, 155:23 finalized [7] - 45:20, 45:23, 83:3, 83:4, 101:11, 134:11, 143:2 finalizing [1] - 52:25 finally [2] - 26:19, 50:5 financially [1] - 177:14 findings [2] - 60:1, 66:8 fine [4] - 100:2, 100:8, 106:2, 106:6 finish [1] - 154:24 finished [1] - 94:7 firm [1] - 11:2 first [40] - 8:12, 11:10, 13:2, 18:18, 20:18, 21:7, 22:1, 22:18, 23:2, 24:5, 39:3, 41:14, 49:21, 53:12, 56:8, 63:9, 66:3, 66:10, 71:12, 72:20, 73:21, 78:6, 78:7, 90:24, 93:15, 99:1, 111:5, 114:15, 114:17, 115:6, 124:23, 125:7, 131:25, 139:17, 148:14, 156:15, 170:1, 170:22, 172:18, 172:23 Fish [8] - 8:19, 9:1, 15:21, 21:23, 34:14, 71:20, 113:8, 116:5 fish [15] - 8:23, 8:24, 20:7, 27:12, 67:25, 68:8, 68:20, 71:23, 89:3, 161:8, 161:10, 161:12, 161:14, 161:25 fishable [1] - 28:14 fishable/non [2] - 106:22, 107:12 fishable/swimmable [20] - 27:15, 30:6, 30:11, 30:18, 30:19, 30:24, 31:20, 31:24, 32:2, 32:4, 33:3, 33:7, 60:18, 75:15, 90:8, 91:19, 108:15, 110:15, 152:19, 154:6 fisheries [1] - 71:19 fisherman [1] - 8:15</p>	<p>fishery [2] - 119:8, 119:13 fishes [1] - 9:23 fishing [7] - 34:20, 88:3, 88:19, 89:4, 89:5, 89:15, 89:21 fit [3] - 158:1, 158:14, 158:19 five [18] - 21:13, 41:21, 51:19, 51:23, 52:4, 52:17, 52:20, 86:13, 122:19, 122:20, 123:22, 123:23, 124:25, 125:10, 127:17, 132:12, 132:13 fix [1] - 148:18 flexibilities [1] - 50:13 flexibility [6] - 97:14, 97:20, 102:8, 116:20, 126:10, 134:14 float [4] - 84:5, 84:9, 84:15, 84:18 flow [9] - 28:4, 49:17, 59:17, 61:22, 162:21, 164:8, 164:12, 165:12, 175:6 fly [1] - 8:15 focus [4] - 159:4, 162:19, 164:23, 166:10 focused [2] - 48:9, 161:7 folks [1] - 168:22 follow [7] - 108:9, 155:22, 156:1, 156:7, 164:10, 170:2, 175:23 follow-up [2] - 164:10, 170:2 following [3] - 33:12, 107:15, 150:4 follows [8] - 8:13, 23:3, 39:4, 53:13, 63:10, 71:13, 170:23, 172:19 Footnote [2] - 109:9, 109:24 footnote [6] - 84:17, 89:2, 109:8, 109:23, 110:1, 148:15 footnoted [1] - 86:23 FOR [3] - 1:6, 2:2, 2:15 forced [1] - 44:18 forces [1] - 122:6 forecast [1] - 168:11 foregoing [2] - 177:5, 177:6 foreseeable [1] -</p>	<p>119:15 Forest [1] - 55:1 forget [1] - 96:16 fork [3] - 66:21, 67:3, 67:5 Fork [3] - 66:12, 66:23, 67:9 form [2] - 77:13, 146:13 formally [2] - 13:23, 104:13 former [2] - 55:17, 65:10 formula [1] - 144:19 Fort [1] - 157:1 forth [1] - 111:6 forward [5] - 8:8, 14:13, 116:21, 167:9, 172:14 Foundation [1] - 23:23 four [12] - 21:25, 35:8, 56:14, 58:16, 62:16, 62:23, 79:7, 121:19, 121:24, 132:16, 132:23, 156:22 fourth [2] - 22:5, 50:5 frame [4] - 134:15, 162:18, 163:21, 164:2 framework [1] - 51:4 Francis [2] - 2:17, 173:14 Franciscan [1] - 172:22 Francisco [1] - 69:16 frankly [2] - 17:1, 17:13 free [5] - 11:15, 29:22, 73:10, 170:17, 172:15 Freeport [11] - 3:2, 10:25, 11:2, 51:19, 52:13, 52:24, 104:19, 113:15, 113:20, 154:14, 175:24 Freeport-McMoRan [7] - 3:2, 10:25, 11:2, 51:19, 52:13, 52:24, 175:24 front [3] - 112:4, 116:19, 124:8 full [1] - 105:2 fully [3] - 20:16, 99:6, 99:7 function [2] - 45:2, 146:16 fundamental [1] - 167:24</p>
F				
<p>F(1) [2] - 136:24 F(1)(b) [2] - 133:19, 134:7 F(5) [6] - 128:7, 129:16, 135:2, 138:7, 138:12, 140:21 F(5) [1] - 131:7 F(6) [1] - 140:25 F(7) [1] - 136:19 facilities [9] - 25:5, 40:6, 56:11, 56:12, 58:21, 62:10, 132:13, 132:17, 169:13 facility [7] - 11:20, 131:24, 131:25, 132:6, 132:14, 140:11, 140:12 fact [13] - 13:4, 15:12, 16:18, 16:22, 44:8, 96:22, 102:5, 102:11, 110:23, 116:6, 132:1, 152:13, 169:11 factor [4] - 59:16, 168:23, 168:24, 169:5 Factor [3] - 59:16, 59:20, 168:23 factors [9] - 31:5, 46:3, 49:15, 56:18, 59:15, 167:18, 167:19, 168:2, 168:5 facts [1] - 20:5 Fahrenheit [1] - 30:5 failed [1] - 53:8 fairly [2] - 104:7, 161:14 fall [4] - 60:14, 76:23, 116:4, 164:16 familiar [2] - 89:24, 118:17 familiarized [1] - 25:24</p>	<p>February [1] - 52:8 Federal [2] - 98:8, 105:7 federal [40] - 9:16, 19:10, 19:18, 20:13, 27:5, 28:21, 28:25, 30:9, 30:14, 30:22, 33:6, 43:3, 44:4, 44:19, 44:25, 47:6, 47:8, 47:9, 47:16, 47:23, 48:10, 49:8, 49:11, 51:2, 54:2, 95:23, 101:11, 108:14, 115:19, 117:2, 137:20, 143:2, 143:5, 144:8, 145:7, 145:16, 146:1, 148:1, 156:5 federally [2] - 25:5, 25:8 feedback [1] - 61:25 felt [2] - 16:16, 144:19 few [1] - 73:7 field [5] - 34:12, 163:19, 165:2, 165:8 FIFRA [2] - 116:11, 117:6 file [1] - 46:14 filed [21] - 6:21, 11:16, 12:12, 12:13, 25:22, 38:9, 40:7, 40:12, 41:1, 41:4, 41:7, 48:14, 49:21, 55:10, 55:24, 64:22, 65:5, 66:22, 70:18, 77:5, 83:2 filing [6] - 11:24, 12:18, 38:12, 40:17, 77:16, 98:13 filings [1] - 11:9 fill [3] - 44:20, 47:10, 142:24 final [17] - 20:11,</p>	<p>49:6, 51:21, 52:14, 52:20, 53:5, 70:11, 71:1, 97:3, 97:7, 98:18, 98:19, 99:21, 105:18, 110:10, 155:16, 155:23 finalized [7] - 45:20, 45:23, 83:3, 83:4, 101:11, 134:11, 143:2 finalizing [1] - 52:25 finally [2] - 26:19, 50:5 financially [1] - 177:14 findings [2] - 60:1, 66:8 fine [4] - 100:2, 100:8, 106:2, 106:6 finish [1] - 154:24 finished [1] - 94:7 firm [1] - 11:2 first [40] - 8:12, 11:10, 13:2, 18:18, 20:18, 21:7, 22:1, 22:18, 23:2, 24:5, 39:3, 41:14, 49:21, 53:12, 56:8, 63:9, 66:3, 66:10, 71:12, 72:20, 73:21, 78:6, 78:7, 90:24, 93:15, 99:1, 111:5, 114:15, 114:17, 115:6, 124:23, 125:7, 131:25, 139:17, 148:14, 156:15, 170:1, 170:22, 172:18, 172:23 Fish [8] - 8:19, 9:1, 15:21, 21:23, 34:14, 71:20, 113:8, 116:5 fish [15] - 8:23, 8:24, 20:7, 27:12, 67:25, 68:8, 68:20, 71:23, 89:3, 161:8, 161:10, 161:12, 161:14, 161:25 fishable [1] - 28:14 fishable/non [2] - 106:22, 107:12 fishable/swimmable [20] - 27:15, 30:6, 30:11, 30:18, 30:19, 30:24, 31:20, 31:24, 32:2, 32:4, 33:3, 33:7, 60:18, 75:15, 90:8, 91:19, 108:15, 110:15, 152:19, 154:6 fisheries [1] - 71:19 fisherman [1] - 8:15</p>	<p>fishery [2] - 119:8, 119:13 fishes [1] - 9:23 fishing [7] - 34:20, 88:3, 88:19, 89:4, 89:5, 89:15, 89:21 fit [3] - 158:1, 158:14, 158:19 five [18] - 21:13, 41:21, 51:19, 51:23, 52:4, 52:17, 52:20, 86:13, 122:19, 122:20, 123:22, 123:23, 124:25, 125:10, 127:17, 132:12, 132:13 fix [1] - 148:18 flexibilities [1] - 50:13 flexibility [6] - 97:14, 97:20, 102:8, 116:20, 126:10, 134:14 float [4] - 84:5, 84:9, 84:15, 84:18 flow [9] - 28:4, 49:17, 59:17, 61:22, 162:21, 164:8, 164:12, 165:12, 175:6 fly [1] - 8:15 focus [4] - 159:4, 162:19, 164:23, 166:10 focused [2] - 48:9, 161:7 folks [1] - 168:22 follow [7] - 108:9, 155:22, 156:1, 156:7, 164:10, 170:2, 175:23 follow-up [2] - 164:10, 170:2 following [3] - 33:12, 107:15, 150:4 follows [8] - 8:13, 23:3, 39:4, 53:13, 63:10, 71:13, 170:23, 172:19 Footnote [2] - 109:9, 109:24 footnote [6] - 84:17, 89:2, 109:8, 109:23, 110:1, 148:15 footnoted [1] - 86:23 FOR [3] - 1:6, 2:2, 2:15 forced [1] - 44:18 forces [1] - 122:6 forecast [1] - 168:11 foregoing [2] - 177:5, 177:6 foreseeable [1] -</p>	<p>119:15 Forest [1] - 55:1 forget [1] - 96:16 fork [3] - 66:21, 67:3, 67:5 Fork [3] - 66:12, 66:23, 67:9 form [2] - 77:13, 146:13 formally [2] - 13:23, 104:13 former [2] - 55:17, 65:10 formula [1] - 144:19 Fort [1] - 157:1 forth [1] - 111:6 forward [5] - 8:8, 14:13, 116:21, 167:9, 172:14 Foundation [1] - 23:23 four [12] - 21:25, 35:8, 56:14, 58:16, 62:16, 62:23, 79:7, 121:19, 121:24, 132:16, 132:23, 156:22 fourth [2] - 22:5, 50:5 frame [4] - 134:15, 162:18, 163:21, 164:2 framework [1] - 51:4 Francis [2] - 2:17, 173:14 Franciscan [1] - 172:22 Francisco [1] - 69:16 frankly [2] - 17:1, 17:13 free [5] - 11:15, 29:22, 73:10, 170:17, 172:15 Freeport [11] - 3:2, 10:25, 11:2, 51:19, 52:13, 52:24, 104:19, 113:15, 113:20, 154:14, 175:24 Freeport-McMoRan [7] - 3:2, 10:25, 11:2, 51:19, 52:13, 52:24, 175:24 front [3] - 112:4, 116:19, 124:8 full [1] - 105:2 fully [3] - 20:16, 99:6, 99:7 function [2] - 45:2, 146:16 fundamental [1] - 167:24</p>

KATHY TOWNSEND COURT REPORTERS

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<p>future [3] - 43:11, 92:16, 168:11</p>	<p>30:6, 30:18, 30:24, 31:19, 50:24, 87:13, 91:20, 111:13</p>	<p>152:12, 152:17, 152:22, 153:2, 153:8, 153:14, 153:21, 154:2, 154:8, 155:2, 155:7</p>	<p>hardness-based [10] - 22:14, 144:5, 144:19, 145:16, 145:18, 145:25, 147:16, 147:21, 148:1, 171:22</p>	<p>hearings [3] - 9:3, 9:8, 21:1</p>
<p>G</p>	<p>Gold [1] - 161:3</p>	<p>Goodrich [2] - 5:17, 10:18</p>	<p>hardness-dependent [1] - 150:11</p>	<p>held [8] - 6:18, 24:3, 63:17, 64:11, 64:16, 69:9, 103:6, 118:4</p>
<p>GALLAGHER [1] - 3:4</p> <p>Gallagher [1] - 10:25</p> <p>game [1] - 141:17</p> <p>Game [8] - 8:19, 8:25, 15:20, 21:23, 34:14, 71:19, 113:8, 116:4</p> <p>gander [1] - 103:25</p> <p>gears [1] - 138:19</p> <p>general [21] - 29:15, 29:17, 37:4, 58:10, 74:3, 116:7, 116:12, 121:23, 122:6, 122:10, 122:12, 122:24, 123:7, 124:11, 124:12, 124:24, 126:9, 126:22, 134:20, 158:19, 170:13</p> <p>General [1] - 2:17</p> <p>generally [7] - 70:4, 94:15, 119:5, 119:6, 119:11, 125:17, 157:21</p> <p>generate [2] - 57:5, 60:24</p> <p>Gensemer [1] - 17:5</p> <p>geologic [2] - 146:17</p> <p>Geological [1] - 66:16</p> <p>Geology [1] - 55:3</p> <p>geology [1] - 146:18</p> <p>geomorphic [2] - 61:3, 165:11</p> <p>Georgia [1] - 64:8</p> <p>Germaine [1] - 11:1</p> <p>GERMAINE [1] - 3:3</p> <p>germaine.</p> <p>chappelle@gknet.com [1] - 3:7</p> <p>Gila [15] - 66:4, 66:11, 66:13, 66:14, 66:21, 66:23, 66:24, 67:3, 67:5, 67:6, 67:9, 69:5, 69:16, 69:20</p> <p>given [9] - 13:4, 15:2, 15:12, 114:11, 147:1, 153:9, 171:6, 173:22, 177:9</p> <p>goal [4] - 33:20, 42:21, 57:19, 123:20</p> <p>goals [12] - 27:15, 27:19, 28:15, 30:3,</p>	<p>GOODRICH [138] - 3:10, 10:17, 14:8, 15:15, 16:5, 99:19, 99:24, 103:23, 114:21, 120:7, 120:11, 120:21, 120:22, 121:2, 121:8, 121:14, 121:19, 122:2, 122:9, 122:18, 122:21, 123:2, 124:1, 124:6, 124:19, 125:4, 125:16, 125:20, 125:24, 126:3, 126:7, 126:18, 127:4, 127:9, 127:16, 127:21, 128:6, 128:10, 128:20, 129:9, 129:15, 129:21, 130:4, 130:14, 130:21, 131:4, 131:9, 131:15, 131:23, 132:6, 132:11, 132:22, 133:2, 133:13, 133:17, 133:21, 134:3, 134:19, 134:24, 135:4, 135:9, 135:14, 135:18, 136:5, 136:8, 136:12, 136:18, 137:5, 137:12, 137:22, 138:6, 138:11, 138:15, 138:19, 138:25, 139:5, 139:9, 139:14, 139:22, 140:1, 140:8, 140:17, 140:24, 141:6, 141:19, 141:23, 142:2, 142:8, 142:10, 142:13, 142:19, 142:22, 143:7, 143:14, 143:17, 143:21, 143:25, 144:13, 144:16, 144:21, 144:24, 145:5, 145:11, 145:15, 145:24, 146:4, 146:21, 147:7, 147:14, 147:23, 148:10, 148:22, 149:3, 149:10, 149:15, 149:21, 149:24, 150:1, 150:15, 150:18, 150:21, 151:2, 151:6, 151:8, 151:17, 151:22, 152:4,</p>	<p>Goodrich [2] - 5:17, 10:18</p> <p>goose [1] - 103:25</p> <p>government [1] - 171:13</p> <p>Grande [3] - 80:24, 83:11, 84:3</p> <p>grateful [1] - 171:5</p> <p>great [3] - 78:3, 115:1, 171:9</p> <p>greater [2] - 32:21, 150:5</p> <p>grounds [1] - 12:24</p> <p>Groundwater [1] - 52:24</p> <p>groundwaters [1] - 19:23</p> <p>Group [1] - 70:1</p> <p>group [2] - 27:24, 71:21</p> <p>groups [2] - 37:15, 37:16</p> <p>guess [9] - 15:1, 115:18, 117:4, 118:12, 134:8, 140:17, 144:17, 157:13, 158:17</p> <p>guidance [11] - 15:21, 15:22, 16:12, 16:17, 93:9, 93:22, 104:3, 104:5, 121:16, 158:10, 163:5</p> <p>Guidelines [1] - 7:1</p> <p>guidelines [1] - 7:2</p> <p>Gundersen [1] - 17:3</p> <p>guys [2] - 115:1, 116:23</p>	<p>hardness-</p> <p>Harold [1] - 2:18</p> <p>hazard [2] - 76:14, 76:19</p> <p>heading [1] - 111:5</p> <p>headquarters [1] - 124:14</p> <p>heads [1] - 68:19</p> <p>headwater [2] - 68:14, 68:16</p> <p>headwaters [1] - 175:5</p> <p>health [14] - 9:5, 10:3, 20:2, 27:2, 27:7, 28:10, 29:18, 29:23, 76:14, 76:19, 93:20, 93:23, 126:25, 159:23</p> <p>hear [5] - 15:11, 54:6, 160:15, 174:6, 174:23</p> <p>heard [1] - 7:4</p> <p>HEARING [1] - 2:9</p> <p>hearing [46] - 1:15, 6:12, 6:24, 7:3, 7:4, 7:13, 8:4, 9:11, 9:17, 9:20, 12:25, 13:8, 13:14, 14:3, 15:13, 19:1, 19:9, 19:12, 19:20, 20:10, 36:22, 36:25, 37:1, 37:2, 37:7, 40:10, 46:15, 55:9, 55:13, 65:3, 65:20, 72:3, 83:25, 105:23, 114:22, 115:13, 117:15, 117:17, 117:22, 118:4, 119:1, 138:16, 158:15, 174:21, 175:21, 177:5</p> <p>Hearing [35] - 1:16, 6:12, 6:17, 10:13, 11:8, 13:17, 14:12, 16:6, 17:11, 18:3, 18:16, 18:25, 72:24, 73:3, 77:11, 99:19, 99:25, 103:3, 103:15, 104:18, 104:20, 113:4, 113:24, 115:9, 118:10, 120:1, 120:4, 120:12, 128:14, 129:4, 154:17, 155:2, 165:23, 166:7, 169:24</p>	<p>help [5] - 17:7, 165:23, 166:19, 167:13, 169:22</p> <p>helpful [4] - 16:18, 98:21, 98:24, 174:9</p> <p>helping [1] - 9:22</p> <p>helps [2] - 169:21, 169:22</p> <p>hereby [1] - 177:5</p> <p>hereto [1] - 177:14</p> <p>high [5] - 23:24, 68:6, 68:11, 172:3, 173:24</p> <p>high-quality [1] - 68:11</p> <p>higher [1] - 33:8</p> <p>highest [7] - 42:14, 46:8, 57:24, 58:1, 60:3, 100:20, 101:12</p> <p>highlighted [1] - 150:4</p> <p>hip [1] - 116:2</p> <p>historical [2] - 67:25, 85:20</p> <p>history [1] - 93:2</p> <p>Hogan [5] - 23:14, 24:24, 25:21, 106:17, 109:18</p> <p>Hogan's [3] - 25:25, 26:5, 109:7</p> <p>hold [7] - 19:11, 19:20, 23:17, 54:17, 64:5, 117:21, 138:16</p> <p>holding [1] - 85:21</p> <p>holy [1] - 171:9</p> <p>Honor [1] - 113:20</p> <p>hope [2] - 104:6, 174:13</p> <p>hopefully [2] - 73:1, 159:9</p> <p>Hot [3] - 66:13, 67:6, 84:4</p> <p>hot [3] - 81:16, 85:18, 85:22</p> <p>hour [1] - 1:18</p> <p>HOWARD [1] - 2:4</p> <p>HOYT [1] - 2:7</p> <p>HP [49] - 51:13, 51:14, 51:16, 51:19, 51:21, 52:3, 52:6, 52:9, 52:14, 52:19, 56:7, 56:21, 56:25, 57:3, 57:12, 57:15, 57:17, 57:19, 57:23,</p>
		<p>H</p>		
		<p>habitat [1] - 28:19</p> <p>hand [3] - 8:7, 30:1, 99:17</p> <p>harassment [1] - 7:11</p> <p>hard [4] - 29:20, 30:2, 69:15, 158:15</p> <p>hardness [13] - 22:14, 144:5, 144:19, 145:14, 145:16, 145:18, 145:25, 147:16, 147:21, 148:1, 150:6, 150:11, 171:22</p>		

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<p>58:6, 58:7, 58:14, 58:23, 58:25, 59:5, 59:8, 59:13, 59:20, 60:3, 60:7, 60:23, 61:7, 61:8, 61:16, 61:19, 61:25, 62:3, 62:6, 62:8, 62:14, 62:16, 62:20, 63:2, 109:4, 112:17, 112:19, 163:4, 163:6, 164:23</p> <p>huge [3] - 146:8, 169:13, 169:16</p> <p>human [13] - 9:5, 10:3, 29:18, 58:1, 60:4, 60:21, 61:4, 76:11, 76:17, 88:16, 93:20, 93:23, 126:25</p> <p>HUTCHINSON [11] - 2:4, 118:12, 118:23, 155:13, 155:19, 156:8, 156:10, 156:13, 162:4, 162:6, 163:10</p> <p>Hutchinson [2] - 155:11, 162:5</p> <p>hydro [1] - 162:13</p> <p>hydrologic [5] - 55:1, 57:5, 61:2, 162:20</p> <p>hydrological [1] - 56:18</p> <p>hydrologist [2] - 54:21, 54:25</p> <p>Hydrology [1] - 23:22</p> <p>hydrology [21] - 21:13, 21:18, 23:19, 32:14, 51:12, 52:3, 56:6, 56:25, 57:7, 57:14, 57:17, 59:22, 59:23, 60:6, 61:1, 61:14, 112:16, 158:12, 162:12, 165:10, 165:19</p> <p>hypothetical [3] - 118:8, 132:12, 132:23</p> <p>hypotheticals [1] - 147:18</p> <p style="text-align: center;">I</p> <p>I [1] - 144:25</p> <p>idea [1] - 74:3</p> <p>ideal [1] - 15:16</p> <p>identical [1] - 117:8</p> <p>identification [2] - 49:15, 66:4</p> <p>identified [11] -</p>	<p>15:20, 30:7, 33:17, 40:25, 41:4, 51:7, 60:12, 66:10, 67:15, 130:12, 131:17</p> <p>identifies [1] - 46:7</p> <p>identify [12] - 16:8, 36:4, 41:9, 66:16, 98:9, 101:12, 125:17, 128:11, 130:5, 131:24, 132:4, 165:2</p> <p>identifying [3] - 132:8, 132:10, 159:3</p> <p>idiot [1] - 159:20</p> <p>illuminate [1] - 17:8</p> <p>illustrates [1] - 66:23</p> <p>immersed [1] - 88:9</p> <p>immersion [2] - 76:18, 81:8</p> <p>impact [3] - 127:12, 161:13, 167:4</p> <p>impacts [1] - 147:1</p> <p>impair [1] - 29:23</p> <p>impaired [6] - 49:2, 146:10, 167:8, 173:10, 173:20</p> <p>impairment [3] - 42:16, 147:22, 166:23</p> <p>implement [1] - 167:12</p> <p>implementation [7] - 35:20, 39:15, 54:1, 141:21, 166:21, 167:10, 167:13</p> <p>implemented [9] - 43:5, 47:1, 47:8, 90:9, 128:4, 136:20, 137:3, 137:8, 166:23</p> <p>implementing [5] - 40:2, 44:15, 47:25, 124:17, 166:14</p> <p>implication [1] - 137:1</p> <p>importance [1] - 28:17</p> <p>important [5] - 33:13, 50:10, 97:13, 168:14, 173:12</p> <p>imposes [1] - 140:25</p> <p>improperly [1] - 67:15</p> <p>improve [4] - 24:10, 48:17, 51:4, 131:20</p> <p>improvement [1] - 44:15</p> <p>improving [1] - 128:24</p> <p>IN [1] - 1:5</p> <p>in-holding [1] - 85:21</p> <p>Inc [1] - 3:19</p>	<p>incidents [1] - 160:24</p> <p>include [12] - 28:12, 29:13, 39:13, 49:5, 112:11, 131:19, 131:20, 136:8, 137:15, 138:3, 138:12, 157:12</p> <p>included [13] - 24:17, 35:9, 55:6, 62:25, 66:22, 70:11, 84:13, 105:25, 107:5, 117:14, 117:19, 128:18, 144:9</p> <p>includes [4] - 40:3, 46:17, 85:21, 157:10</p> <p>including [10] - 20:6, 38:5, 42:20, 42:24, 45:16, 64:1, 76:18, 97:8, 134:20, 140:15</p> <p>inclusion [2] - 134:21, 150:16</p> <p>incorporate [2] - 138:22, 143:4</p> <p>incorporating [1] - 134:15</p> <p>incorporation [1] - 125:21</p> <p>increase [1] - 172:8</p> <p>increased [11] - 139:10, 140:2, 140:9, 140:19, 141:3, 141:8, 141:11, 141:13, 141:18, 142:6, 142:7</p> <p>indeed [4] - 67:6, 86:2, 147:12, 147:19</p> <p>independent [1] - 146:23</p> <p>index [6] - 162:16, 163:18, 164:25, 165:7, 165:15</p> <p>Indian [1] - 70:2</p> <p>indicate [5] - 68:14, 86:15, 110:2, 147:22, 161:25</p> <p>indicates [8] - 33:8, 33:20, 71:2, 79:10, 87:9, 92:4, 95:12, 100:22</p> <p>indicating [2] - 75:12, 85:15</p> <p>indication [1] - 85:24</p> <p>indicative [1] - 163:21</p> <p>indicators [3] - 61:3, 165:11, 165:12</p> <p>individually [1] - 80:21</p> <p>indulgence [1] - 119:22</p>	<p>industrial [3] - 20:8, 37:16, 40:6</p> <p>industries [2] - 173:1, 173:2</p> <p>industry [2] - 174:1, 174:12</p> <p>influence [1] - 163:3</p> <p>influencing [2] - 163:8, 165:6</p> <p>information [25] - 15:21, 16:17, 22:3, 33:8, 33:20, 34:10, 42:22, 74:5, 75:21, 75:24, 76:21, 77:3, 79:10, 83:16, 84:22, 84:24, 84:25, 85:1, 87:9, 92:3, 92:4, 92:10, 97:12, 122:5, 165:9</p> <p>informative [1] - 22:6</p> <p>ingesting [3] - 76:13, 81:1, 88:17</p> <p>ingestion [3] - 76:18, 81:8, 89:18</p> <p>initiated [3] - 12:14, 12:15, 21:6</p> <p>injure [1] - 29:18</p> <p>input [5] - 36:4, 37:24, 38:6, 46:13, 118:2</p> <p>inspections [1] - 25:4</p> <p>instance [2] - 90:25, 162:23</p> <p>instances [1] - 20:23</p> <p>instead [3] - 102:7, 125:11, 168:3</p> <p>instigate [1] - 157:21</p> <p>Institute [1] - 64:10</p> <p>integrating [1] - 24:19</p> <p>intend [1] - 83:5</p> <p>intended [1] - 17:7</p> <p>intending [1] - 148:20</p> <p>intends [1] - 101:10</p> <p>intensify [1] - 146:24</p> <p>intent [4] - 12:18, 25:23, 36:2, 149:17</p> <p>intentionally [1] - 134:7</p> <p>interest [1] - 72:9</p> <p>interested [3] - 58:9, 69:3, 177:14</p> <p>interesting [1] - 104:8</p> <p>interface [1] - 146:17</p> <p>Interfaith [1] - 173:5</p> <p>interim [2] - 46:9,</p>	<p>139:4</p> <p>interject [3] - 83:15, 99:20, 113:5</p> <p>intermittent [11] - 56:23, 57:1, 59:17, 60:20, 60:24, 61:9, 61:22, 158:10, 164:17, 164:21, 165:13</p> <p>interpretation [1] - 110:14</p> <p>interpreted [1] - 27:10</p> <p>INTERSTATE [1] - 1:6</p> <p>Interstate [1] - 19:3</p> <p>interstate [1] - 21:5</p> <p>intimate [2] - 76:11, 76:17</p> <p>intimidation [1] - 7:12</p> <p>Intrastate [1] - 19:4</p> <p>intrastate [1] - 21:5</p> <p>INTRASTATE [1] - 1:6</p> <p>introduce [5] - 39:7, 53:16, 63:13, 71:16, 129:6</p> <p>introduction [2] - 17:16, 26:8</p> <p>invalidated [1] - 156:11</p> <p>invasive [1] - 71:24</p> <p>investigated [1] - 66:25</p> <p>invite [1] - 7:23</p> <p>invited [2] - 36:4, 36:9</p> <p>involved [3] - 26:21, 119:14, 137:13</p> <p>involving [1] - 76:12</p> <p>irrigation [1] - 28:19</p> <p>issue [17] - 13:2, 14:1, 14:18, 14:23, 15:12, 16:21, 17:10, 18:1, 20:20, 21:2, 32:9, 100:5, 104:23, 116:16, 146:23, 155:23, 166:20</p> <p>issued [7] - 25:8, 35:15, 58:5, 90:22, 96:3, 111:23, 116:7</p> <p>issues [23] - 9:12, 11:6, 11:18, 13:21, 18:12, 18:13, 20:19, 21:8, 22:2, 22:5, 26:14, 36:4, 63:25, 104:17, 112:10, 112:12, 120:17, 120:18, 123:14,</p>
---	---	---	---	---

KATHY TOWNSEND COURT REPORTERS

110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

(505) 243-5018 - Fax (505) 243-3606

<p>147:2, 173:11, 173:17, 173:18 IT [1] - 1:14 item [1] - 6:6 itself [7] - 96:23, 102:20, 124:22, 129:19, 136:15, 151:19, 161:14</p>	<p style="text-align: center;">K</p> <p>Kathryn [1] - 10:13 KATHRYN [1] - 2:16 kathryn.becker@state.nm.us [1] - 2:19 Kathy [2] - 7:14, 177:4 KATZ [6] - 4:3, 10:22, 13:17, 13:19, 104:18, 113:22 Katz [1] - 10:22 kayaking [3] - 83:18, 83:21, 89:15 keep [3] - 38:21, 71:25, 175:1 keeping [1] - 68:11 KENNEDY [1] - 3:4 Kennedy [1] - 10:25 key [4] - 21:8, 21:25, 26:14, 57:8 kill [1] - 89:3 kind [8] - 115:16, 117:20, 159:11, 167:12, 169:20, 173:13, 174:7, 174:9 kinds [1] - 173:1 King [1] - 161:3 KIRK [2] - 5:13, 71:11 Kirk [3] - 21:22, 22:24, 71:18 knowledge [2] - 84:1, 99:2 known [8] - 19:12, 24:10, 27:14, 30:10, 32:14, 59:16, 90:23, 95:6 KONSTANTIN [1] - 3:4 Konstantin [1] - 11:1 konstantin. parkhomenko@ gknet.com [1] - 3:8 KOUGIOULIS [13] - 5:9, 53:11, 86:6, 157:10, 157:25, 158:4, 158:8, 158:16, 158:23, 158:25, 162:11, 163:17, 164:14 Kougioulis [9] - 21:16, 22:23, 32:17, 51:14, 53:16, 53:18, 54:4, 63:24, 165:1 Kris [1] - 125:14 Kristine [3] - 21:9, 22:22, 39:9 KRISTINE [2] - 5:7,</p>	<p>39:2</p> <p style="text-align: center;">L</p> <p>lab [1] - 13:21 Laboratories [1] - 11:17 Laboratory [4] - 4:8, 4:9, 10:23, 11:20 Lake [5] - 88:1, 88:2, 89:2, 89:12, 119:7 lake [4] - 88:11, 89:4, 89:5, 119:9 lakes [8] - 24:7, 27:20, 119:4, 119:12, 158:14, 158:19, 159:1, 159:3 Land [1] - 84:19 Lands [1] - 55:3 lands [1] - 9:16 language [23] - 22:13, 49:12, 49:14, 49:18, 79:15, 79:24, 97:9, 97:10, 101:14, 106:10, 110:13, 116:20, 117:19, 128:17, 130:18, 131:10, 133:11, 136:13, 138:21, 149:18, 150:3, 150:16, 151:1 LARA [1] - 4:3 Lara [1] - 10:22 large [1] - 55:5 largely [1] - 161:11 LARRY [1] - 2:3 Las [1] - 37:6 last [16] - 11:10, 22:2, 22:12, 44:8, 54:8, 68:2, 73:24, 74:9, 74:23, 79:24, 108:24, 125:3, 129:3, 130:15, 166:15, 174:24 late [2] - 12:13, 95:13 latest [5] - 40:21, 41:9, 77:16, 87:11, 93:8 Laudoto [1] - 173:15 law [2] - 20:12, 121:11 Law [10] - 2:11, 3:5, 3:10, 3:11, 3:16, 3:21, 4:4, 4:8, 10:18, 171:12 leader [3] - 24:8, 24:16, 25:3 least [5] - 19:12, 27:5, 33:11, 45:14,</p>	<p>46:23 leave [2] - 23:14, 101:7 led [1] - 151:11 left [1] - 99:17 left-hand [1] - 99:17 legal [5] - 36:12, 37:1, 54:23, 96:20, 171:16 LEMON [94] - 5:5, 23:1, 73:22, 74:11, 74:16, 74:21, 75:5, 75:11, 75:24, 76:4, 76:7, 76:9, 76:25, 78:17, 78:19, 79:3, 80:14, 81:6, 81:16, 82:2, 82:9, 82:15, 84:17, 84:24, 85:3, 85:7, 85:12, 85:16, 86:24, 87:5, 87:19, 87:23, 88:8, 88:14, 88:25, 89:8, 89:13, 89:23, 90:4, 90:15, 90:19, 91:1, 91:9, 91:18, 92:12, 92:19, 92:23, 106:24, 107:2, 107:7, 107:10, 107:13, 107:19, 108:1, 108:3, 108:5, 108:17, 108:22, 109:4, 109:6, 109:10, 109:15, 109:19, 109:21, 109:25, 110:6, 110:11, 110:16, 110:21, 111:3, 111:8, 111:17, 111:20, 111:25, 112:3, 112:9, 112:13, 112:24, 123:9, 124:12, 125:2, 125:12, 125:19, 136:3, 156:22, 156:24, 159:22, 160:19, 164:25, 165:22, 167:1, 167:3, 167:7, 167:21 lemon [3] - 25:14, 38:16, 73:9 Lemon [13] - 21:8, 22:21, 22:22, 23:8, 43:19, 46:5, 73:17, 73:19, 106:16, 123:3, 123:4, 124:7, 135:23 length [2] - 67:9, 114:12 lengthy [1] - 7:5 less [15] - 32:4, 33:3, 42:10, 58:4, 59:10, 122:19, 144:7, 145:2, 145:17, 145:21,</p>	<p>146:2, 146:6, 146:9, 150:7, 173:8 lesser [1] - 91:21 letter [11] - 70:20, 70:22, 70:25, 71:1, 75:8, 75:11, 94:11, 94:19, 95:15, 148:5, 149:16 letters [1] - 151:10 letting [1] - 119:23 level [1] - 9:20 levels [5] - 46:9, 59:18, 61:23, 164:9, 172:8 License [1] - 177:19 life [42] - 21:18, 22:15, 28:13, 28:14, 29:18, 30:4, 30:20, 31:9, 31:14, 32:13, 58:2, 58:3, 60:5, 60:21, 61:4, 66:6, 67:12, 67:17, 67:18, 67:20, 68:3, 68:6, 68:9, 68:18, 70:6, 90:18, 91:8, 94:22, 107:6, 107:17, 107:25, 108:6, 109:2, 110:15, 110:19, 110:25, 111:9, 112:22, 141:15, 162:1 lifeblood [2] - 171:10, 173:19 lifetime [4] - 132:2, 133:10, 139:14, 139:16 Light [1] - 173:5 likely [11] - 73:8, 79:1, 79:12, 80:1, 80:16, 81:7, 87:10, 88:8, 95:20, 167:7, 168:24 limbo [1] - 118:7 limit [7] - 7:10, 49:2, 90:17, 100:5, 101:8, 134:12, 169:11 limitation [1] - 124:1 limitations [2] - 29:11, 123:11 limited [32] - 28:14, 30:20, 31:14, 32:12, 42:10, 44:14, 45:3, 49:1, 58:2, 60:5, 76:18, 88:20, 89:4, 89:5, 89:7, 91:7, 94:22, 100:18, 101:9, 107:17, 108:6, 109:2, 110:14, 110:19, 110:25, 111:9, 112:22, 114:9, 115:3, 133:6, 139:12, 155:6</p>
<p style="text-align: center;">J</p> <p>JACKSON [1] - 2:8 James [2] - 23:14, 25:21 JANE [1] - 2:4 January [2] - 52:8, 94:19 jmccaleb@ taylorjmccaleb.com [1] - 3:18 Joan [2] - 172:16, 172:21 JOAN [2] - 5:21, 172:17 Jodey [3] - 21:16, 22:23, 53:18 JODEY [2] - 5:9, 53:11 John [1] - 10:13 JOHN [3] - 2:5, 2:6, 2:16 john.verheul@ state.nm.us [1] - 2:20 join [1] - 18:4 joined [1] - 24:5 joining [4] - 23:20, 39:23, 54:19, 64:13 jointly [1] - 11:16 JOLENE [1] - 3:15 Jolene [3] - 10:15, 73:5, 99:21 Journal [1] - 37:5 Juan [13] - 3:14, 10:15, 13:10, 22:15, 48:16, 49:10, 49:20, 50:2, 70:1, 70:3, 70:4, 70:8, 73:6 July [3] - 25:11, 36:21, 69:17 jump [1] - 73:10 June [2] - 63:17, 78:12 jurisdictions [2] - 118:15, 118:17 justified [3] - 46:11, 50:22, 148:6 justify [3] - 131:5, 132:16, 135:11</p>				

KATHY TOWNSEND COURT REPORTERS

110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

(505) 243-5018 - Fax (505) 243-3606

<p>Limited [1] - 8:17 limits [12] - 35:10, 43:13, 43:23, 48:4, 50:23, 132:20, 138:23, 139:1, 139:6, 139:10, 140:3, 166:22 Linda [1] - 15:6 line [1] - 79:8 lines [1] - 169:9 linked [1] - 48:23 list [6] - 15:19, 37:8, 58:9, 69:3, 146:10 listed [9] - 46:5, 57:23, 59:7, 59:15, 60:2, 62:6, 62:10, 62:19, 86:23 listing [1] - 51:24 liter [4] - 145:4, 149:11, 149:12, 150:9 literature [2] - 9:4, 164:8 litigation [3] - 118:14, 118:19, 118:20 livestock [1] - 28:19 lkatz@montand.com [1] - 4:6 LLC [1] - 4:2 load [1] - 24:6 local [2] - 67:21, 137:20 located [4] - 56:15, 58:17, 62:17, 81:16 longer-term [1] - 169:10 LONGWORTH [5] - 2:5, 163:11, 163:13, 164:10, 165:21 Longworth [1] - 163:12 look [19] - 77:2, 80:20, 82:10, 83:9, 84:2, 87:5, 91:9, 93:3, 93:12, 111:4, 124:23, 125:7, 131:16, 159:19, 162:14, 162:15, 164:6, 168:12, 172:9 looked [1] - 78:21 looking [7] - 74:1, 85:7, 127:2, 161:7, 163:1, 164:3, 164:18 looks [2] - 74:6, 165:10 Los [11] - 4:2, 4:9, 4:10, 10:22, 11:17, 11:19, 104:17, 113:16, 113:22, 154:16, 154:18 loss [1] - 42:16</p>	<p>lost [2] - 99:13, 130:20 louder [1] - 158:24 Louis [1] - 10:20 LOUIS [1] - 3:20 Louisiana [4] - 39:21, 39:24, 40:5, 40:6 low [7] - 49:17, 59:17, 61:22, 146:16, 146:19, 147:11, 148:7 low-flow [2] - 59:17, 61:22 lower [4] - 10:2, 67:2, 84:20, 112:21 lrose@montand.com [1] - 3:23</p> <p style="text-align: center;">M</p> <p>ma'am [1] - 74:2 machine [1] - 177:8 mail [3] - 15:7, 36:13, 69:3 mailed [1] - 69:2 mailing [2] - 37:8 main [4] - 66:14, 66:21, 66:24, 173:17 Maine [1] - 64:15 maintain [2] - 8:24, 67:1 maintained [2] - 139:18, 139:19 maintaining [1] - 173:24 manage [1] - 119:7 Management [1] - 84:19 management [5] - 40:1, 71:23, 138:2, 169:2 manager [3] - 24:23, 25:11, 54:20 mandate [1] - 153:5 mandated [1] - 19:9 mandatory [1] - 117:16 manifest [1] - 164:7 manmade [1] - 147:13 manner [1] - 13:7 map [1] - 66:22 maps [1] - 66:16 marginal [1] - 67:17 MARLENE [2] - 5:19, 170:21 Marlene [2] - 170:19, 171:1 master [2] - 23:18</p>	<p>master's [1] - 39:20 MATTER [1] - 1:5 Matter [2] - 103:10, 103:12 matter [7] - 1:15, 6:18, 7:9, 11:24, 12:13, 12:15, 177:12 matters [1] - 7:9 MATTHIAS [1] - 2:5 maximum [2] - 24:6, 30:4 McAllister [5] - 88:1, 88:2, 89:1, 89:12, 119:6 McCaleb [162] - 3:15, 3:16, 5:15, 10:15, 72:24, 73:1, 73:3, 73:5, 73:12, 73:13, 74:2, 74:12, 74:18, 75:2, 75:7, 75:20, 76:1, 76:5, 76:8, 76:20, 77:1, 77:19, 77:25, 78:5, 78:7, 78:11, 78:15, 78:18, 78:20, 79:4, 79:15, 79:20, 80:5, 80:10, 80:15, 80:20, 81:10, 81:23, 82:5, 82:10, 82:17, 82:21, 82:24, 83:5, 83:9, 83:19, 83:24, 84:2, 84:8, 84:14, 84:22, 84:25, 85:6, 85:8, 85:13, 85:17, 86:3, 86:8, 86:12, 86:19, 87:1, 87:16, 87:20, 87:25, 88:12, 88:21, 89:1, 89:10, 89:20, 89:24, 90:11, 90:16, 90:21, 91:3, 91:13, 91:24, 92:9, 92:13, 92:21, 93:5, 93:12, 93:15, 93:22, 94:2, 94:7, 94:14, 95:5, 95:11, 95:16, 95:22, 96:2, 96:5, 96:8, 96:14, 96:22, 97:1, 97:6, 97:11, 97:18, 97:25, 98:4, 98:7, 98:11, 98:19, 98:21, 99:4, 99:9, 99:12, 99:23, 99:25, 100:3, 100:8, 100:11, 100:15, 100:22, 101:1, 101:6, 101:17, 101:20, 101:23, 102:4, 102:11, 102:15, 102:19, 103:1, 103:15, 105:1, 105:6, 105:11, 106:8,</p>	<p>106:15, 106:25, 107:3, 107:8, 107:11, 107:14, 107:20, 108:2, 108:4, 108:8, 108:18, 108:23, 109:5, 109:7, 109:11, 109:17, 109:20, 109:22, 110:1, 110:7, 110:12, 110:17, 110:23, 111:4, 111:15, 111:19, 111:22, 112:6, 112:11, 112:18, 112:25 McMoRan [7] - 3:2, 10:25, 11:2, 51:19, 52:13, 52:24, 175:24 mean [10] - 15:16, 33:25, 89:6, 90:8, 92:25, 128:21, 136:22, 155:22, 167:2, 168:19 means [5] - 76:9, 76:15, 88:15, 139:1, 172:3 measurements [2] - 147:19, 165:3 measures [2] - 29:2, 53:24 measuring [1] - 147:20 mechanisms [3] - 122:23, 123:8, 124:10 medical [1] - 23:14 meet [13] - 33:7, 35:17, 43:23, 67:6, 81:21, 91:19, 131:1, 153:8, 167:17, 168:2, 168:19, 169:5 meeting [7] - 6:3, 36:21, 69:9, 69:16, 97:21, 134:1, 135:25 meetings [1] - 24:11 member [1] - 151:22 members [2] - 114:4, 175:18 Members [11] - 5:16, 5:18, 6:14, 18:24, 73:4, 113:25, 114:6, 115:2, 119:18, 170:5, 170:25 MEMBERS [2] - 115:10, 155:12 memo [4] - 82:14, 84:4, 86:23, 88:2 memory [1] - 160:14 mention [1] - 129:25 mentioned [9] - 7:24, 60:6, 104:1, 119:6, 124:6, 133:4, 143:8,</p>	<p>147:24, 157:17 Mercy [1] - 171:3 merged [1] - 49:25 mesh [1] - 169:8 met [5] - 36:16, 40:18, 48:12, 48:13, 97:22 metals [3] - 146:11, 147:20, 147:21 method [1] - 8:22 methodology [4] - 57:4, 59:21, 60:7, 61:8 Mexican [1] - 37:6 MEXICO [3] - 1:1, 2:15, 177:1 Mexico [69] - 1:18, 2:13, 2:18, 3:6, 3:12, 3:17, 3:22, 4:5, 4:10, 6:21, 6:25, 8:16, 10:14, 15:20, 16:8, 16:22, 19:8, 21:3, 21:22, 23:9, 24:18, 25:7, 26:24, 26:25, 27:4, 27:17, 28:18, 29:3, 30:19, 31:12, 34:13, 36:12, 37:3, 40:4, 41:16, 50:11, 53:20, 54:9, 56:3, 56:11, 56:24, 59:25, 60:9, 60:13, 61:6, 61:10, 62:5, 63:16, 64:6, 67:13, 68:4, 69:10, 71:19, 72:13, 89:21, 89:25, 97:20, 103:10, 121:11, 152:18, 155:21, 157:8, 170:25, 171:7, 171:20, 172:6, 173:3, 173:4 Mexico's [8] - 6:19, 19:3, 19:6, 20:24, 24:14, 27:18, 31:7, 141:20 microbiology [1] - 64:7 microgram [1] - 145:3 micrograms [3] - 149:11, 149:12, 150:9 middle [1] - 25:1 might [8] - 13:14, 17:15, 83:15, 113:4, 116:3, 167:25, 169:25, 173:15 Mimbres [17] - 22:16, 51:20, 56:16, 58:18, 62:18, 62:24, 66:7, 68:3, 68:5, 68:13, 68:18, 69:12, 69:15,</p>
---	---	---	---	--

KATHY TOWNSEND COURT REPORTERS

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<p>69:17, 69:21, 70:20, 71:6</p> <p>mimic [1] - 101:25</p> <p>mind [5] - 108:9, 114:19, 133:16, 134:25, 175:1</p> <p>Mine [1] - 161:4</p> <p>mine [1] - 161:18</p> <p>Mines [2] - 3:2, 21:14</p> <p>minimal [1] - 88:18</p> <p>minimum [6] - 20:1, 27:1, 133:7, 133:18, 133:22, 134:21</p> <p>mining [1] - 174:1</p> <p>Mining [2] - 3:19, 10:21</p> <p>minor [3] - 21:14, 64:6, 70:7</p> <p>minute [1] - 174:24</p> <p>minutes [1] - 154:22</p> <p>misidentified [1] - 67:1</p> <p>misidentifying [1] - 66:12</p> <p>misspoke [1] - 108:8</p> <p>mistake [1] - 96:14</p> <p>mixing [2] - 150:6, 150:8</p> <p>mo@ saucedochavez.com [1] - 2:14</p> <p>moderate [1] - 164:5</p> <p>modifications [2] - 94:25, 95:3</p> <p>modified [2] - 44:1, 101:3</p> <p>modify [1] - 19:14</p> <p>MOELLENBERG [3] - 3:3, 10:24, 18:3</p> <p>Moellenberg [1] - 10:24</p> <p>moisture [1] - 163:23</p> <p>moment [2] - 99:13, 108:10</p> <p>monitoring [9] - 24:15, 32:22, 34:11, 34:13, 55:5, 63:23, 85:3, 85:4, 131:20</p> <p>Monitoring [3] - 24:16, 24:23, 25:12</p> <p>Montana [3] - 54:18, 55:3, 118:20</p> <p>MONTGOMERY [2] - 3:21, 4:4</p> <p>Montgomery [1] - 10:20</p> <p>month [3] - 162:23, 162:25, 164:12</p> <p>months [3] - 82:19, 163:24, 163:25</p>	<p>moral [1] - 174:12</p> <p>morning [10] - 6:10, 10:12, 13:10, 14:7, 15:7, 114:15, 154:25, 170:8, 170:16, 175:22</p> <p>MORRIS [1] - 2:10</p> <p>Morris [2] - 1:15, 6:16</p> <p>most [18] - 37:25, 40:21, 48:9, 57:13, 67:7, 73:8, 73:17, 95:19, 98:13, 149:1, 158:3, 162:1, 165:18, 166:24, 167:7, 168:22, 168:23</p> <p>Most [1] - 120:22</p> <p>motion [1] - 18:7</p> <p>move [9] - 6:6, 14:11, 95:17, 103:17, 113:3, 116:20, 167:9, 170:11, 173:6</p> <p>moved [2] - 13:11, 159:11</p> <p>MR [361] - 2:3, 2:3, 2:4, 2:5, 2:5, 2:6, 2:6, 2:7, 2:8, 2:10, 2:16, 3:3, 3:4, 3:10, 3:20, 4:7, 6:1, 6:13, 8:10, 8:15, 10:4, 10:12, 10:17, 10:20, 10:24, 11:4, 11:8, 13:1, 13:18, 14:2, 14:8, 14:10, 14:12, 14:22, 15:9, 15:15, 16:2, 16:3, 16:5, 17:9, 17:11, 17:25, 18:3, 18:9, 18:16, 18:20, 18:23, 22:19, 22:20, 23:5, 38:18, 38:20, 38:22, 38:23, 38:24, 53:15, 63:12, 71:15, 72:17, 72:19, 72:25, 73:2, 77:11, 77:12, 77:13, 77:22, 77:24, 78:2, 78:3, 78:14, 78:16, 82:14, 82:16, 82:18, 82:23, 83:15, 83:22, 84:1, 84:7, 84:10, 85:20, 86:2, 86:5, 86:6, 86:11, 86:18, 86:22, 99:19, 99:24, 100:2, 100:4, 100:10, 103:4, 103:7, 103:9, 103:22, 103:23, 104:8, 104:11, 104:15, 104:17, 104:19, 104:21, 105:5, 105:10, 105:12, 105:15, 105:16,</p>	<p>106:2, 106:5, 106:13, 113:2, 113:4, 113:6, 113:7, 113:13, 113:18, 113:19, 113:21, 113:23, 113:24, 113:25, 114:3, 114:4, 114:18, 114:19, 114:21, 114:23, 115:1, 115:7, 115:18, 115:23, 116:1, 116:22, 116:25, 117:25, 118:5, 118:12, 118:16, 118:23, 118:24, 118:25, 119:1, 119:5, 119:10, 119:11, 119:17, 119:18, 119:20, 119:25, 120:1, 120:3, 120:5, 120:7, 120:8, 120:9, 120:10, 120:11, 120:21, 120:22, 121:2, 121:8, 121:14, 121:19, 122:2, 122:9, 122:14, 122:18, 122:21, 123:2, 124:1, 124:6, 124:19, 125:4, 125:16, 125:20, 125:24, 126:3, 126:7, 126:18, 127:4, 127:9, 127:16, 127:21, 128:6, 128:10, 128:20, 129:3, 129:9, 129:13, 129:15, 129:21, 130:4, 130:14, 130:21, 131:4, 131:9, 131:15, 131:23, 132:6, 132:11, 132:22, 133:2, 133:13, 133:17, 133:21, 134:3, 134:19, 134:24, 135:4, 135:9, 135:14, 135:18, 136:5, 136:8, 136:12, 136:18, 137:5, 137:12, 137:22, 138:6, 138:11, 138:15, 138:19, 138:25, 139:5, 139:9, 139:14, 139:22, 140:1, 140:8, 140:17, 140:24, 141:6, 141:19, 141:23, 142:2, 142:8, 142:10, 142:13, 142:19, 142:22, 143:7, 143:14, 143:17, 143:21, 143:25, 144:13, 144:16,</p>	<p>144:21, 144:24, 145:5, 145:11, 145:15, 145:24, 146:4, 146:8, 146:21, 147:3, 147:7, 147:10, 147:14, 147:18, 147:23, 148:10, 148:22, 149:3, 149:10, 149:15, 149:21, 149:24, 150:1, 150:15, 150:18, 150:21, 151:2, 151:6, 151:8, 151:17, 151:22, 152:4, 152:12, 152:17, 152:22, 153:2, 153:8, 153:14, 153:21, 154:1, 154:2, 154:8, 154:10, 154:13, 154:14, 154:16, 154:17, 154:20, 155:2, 155:5, 155:7, 155:8, 155:13, 155:19, 156:8, 156:10, 156:13, 156:16, 156:17, 156:23, 157:3, 157:4, 157:5, 157:10, 157:23, 157:25, 158:1, 158:4, 158:6, 158:8, 158:13, 158:16, 158:21, 158:23, 158:25, 159:5, 159:8, 160:11, 160:13, 160:14, 160:17, 160:18, 160:20, 160:23, 161:2, 161:3, 161:6, 162:3, 162:4, 162:5, 162:6, 162:10, 162:11, 163:10, 163:11, 163:12, 163:13, 163:17, 164:10, 164:14, 165:21, 165:23, 166:3, 166:6, 169:24, 170:4, 170:9, 170:10, 172:12, 175:17, 176:1, 176:2</p> <p>MS [477] - 2:4, 2:16, 3:3, 3:15, 4:3, 4:9, 10:15, 10:22, 13:17, 13:19, 15:6, 38:25, 39:6, 53:10, 72:24, 73:1, 73:3, 73:12, 73:13, 73:22, 74:2, 74:11, 74:12, 74:16, 74:18, 74:21, 75:2, 75:5, 75:7, 75:11, 75:20, 75:24, 76:1, 76:4, 76:5, 76:7, 76:8,</p>	<p>76:9, 76:20, 76:25, 77:1, 77:19, 77:25, 78:5, 78:6, 78:7, 78:10, 78:11, 78:15, 78:17, 78:18, 78:19, 78:20, 79:3, 79:4, 79:14, 79:15, 79:19, 79:20, 80:4, 80:5, 80:8, 80:10, 80:13, 80:14, 80:15, 80:19, 80:20, 81:5, 81:6, 81:10, 81:16, 81:23, 82:1, 82:2, 82:5, 82:9, 82:10, 82:15, 82:17, 82:21, 82:24, 83:3, 83:5, 83:7, 83:9, 83:19, 83:24, 84:2, 84:8, 84:14, 84:17, 84:22, 84:24, 84:25, 85:3, 85:6, 85:7, 85:8, 85:12, 85:13, 85:16, 85:17, 86:1, 86:3, 86:8, 86:12, 86:19, 86:24, 87:1, 87:5, 87:16, 87:19, 87:20, 87:23, 87:25, 88:8, 88:12, 88:14, 88:21, 88:25, 89:1, 89:8, 89:10, 89:13, 89:20, 89:23, 89:24, 90:4, 90:11, 90:15, 90:19, 90:21, 91:1, 91:3, 91:9, 91:12, 91:13, 91:18, 91:24, 92:8, 92:9, 92:12, 92:13, 92:19, 92:21, 92:23, 93:5, 93:11, 93:12, 93:14, 93:15, 93:17, 93:22, 94:1, 94:6, 94:7, 94:10, 94:14, 94:15, 95:5, 95:10, 95:11, 95:15, 95:16, 95:21, 95:22, 96:1, 96:2, 96:4, 96:5, 96:7, 96:8, 96:12, 96:14, 96:21, 96:22, 96:25, 97:1, 97:4, 97:6, 97:10, 97:11, 97:17, 97:18, 97:24, 97:25, 98:3, 98:4, 98:6, 98:7, 98:9, 98:11, 98:16, 98:17, 98:19, 98:20, 98:21, 98:25, 99:4, 99:7, 99:9, 99:11, 99:12, 99:23, 99:25, 100:3, 100:8, 100:11, 100:14, 100:15, 100:17, 100:22, 100:25, 101:1, 101:5, 101:6, 101:10, 101:17, 101:19,</p>
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101:20, 101:22, 101:23, 102:2, 102:4, 102:10, 102:11, 102:14, 102:15, 102:18, 102:19, 102:25, 103:1, 103:15, 104:18, 104:20, 105:1, 105:6, 105:11, 105:18, 105:20, 105:22, 105:23, 106:3, 106:8, 106:12, 106:15, 106:24, 106:25, 107:2, 107:3, 107:7, 107:8, 107:10, 107:11, 107:13, 107:14, 107:19, 107:20, 108:1, 108:2, 108:3, 108:4, 108:5, 108:8, 108:17, 108:18, 108:22, 108:23, 109:4, 109:5, 109:6, 109:7, 109:10, 109:11, 109:14, 109:15, 109:17, 109:19, 109:20, 109:21, 109:22, 109:25, 110:1, 110:6, 110:7, 110:11, 110:12, 110:16, 110:17, 110:21, 110:23, 111:3, 111:4, 111:8, 111:15, 111:17, 111:19, 111:20, 111:22, 111:25, 112:2, 112:3, 112:4, 112:6, 112:9, 112:11, 112:13, 112:18, 112:24, 112:25, 113:20, 113:22, 114:16, 114:25, 115:5, 115:8, 115:11, 115:22, 115:24, 116:24, 118:1, 121:1, 121:6, 121:13, 121:18, 122:1, 122:8, 122:11, 122:15, 122:20, 122:25, 123:9, 124:5, 124:12, 125:2, 125:12, 125:15, 125:18, 125:19, 125:23, 126:1, 126:6, 126:12, 126:23, 127:6, 127:14, 127:20, 127:24, 128:9, 128:13, 129:4, 129:19, 130:3, 130:9, 130:16, 130:25, 131:8, 131:14, 131:19, 132:4, 132:9,	132:18, 133:1, 133:12, 133:15, 133:20, 133:23, 134:10, 134:23, 135:3, 135:6, 135:13, 135:17, 135:20, 136:3, 136:4, 136:6, 136:10, 136:16, 136:23, 137:11, 137:15, 138:2, 138:10, 138:14, 138:18, 138:24, 139:4, 139:8, 139:12, 139:16, 139:25, 140:6, 140:13, 140:23, 141:5, 141:16, 141:22, 142:1, 142:6, 142:9, 142:12, 142:17, 142:21, 143:1, 143:13, 143:16, 143:20, 143:24, 144:12, 144:15, 144:18, 144:23, 145:3, 145:9, 145:13, 145:22, 146:3, 148:9, 148:12, 149:2, 149:9, 149:14, 149:20, 149:23, 149:25, 150:14, 150:17, 150:20, 150:23, 151:5, 151:7, 151:13, 151:21, 152:1, 152:11, 152:16, 152:21, 153:1, 153:7, 153:13, 153:20, 153:25, 154:7, 154:15, 155:18, 156:3, 156:9, 156:12, 156:14, 156:22, 156:24, 157:9, 158:24, 159:22, 160:19, 164:25, 165:22, 166:2, 166:7, 167:1, 167:2, 167:3, 167:4, 167:7, 167:14, 167:21, 167:22, 168:4, 168:10, 168:21, 168:25, 170:18, 170:20, 170:25, 172:21 multiple [14] - 12:17, 12:18, 69:15, 127:21, 128:11, 128:19, 129:16, 129:22, 130:5, 130:11, 130:23, 131:17, 165:11 municipal [2] - 25:3, 40:6 municipalities [7] -	37:15, 166:13, 168:16, 168:22, 169:17, 169:22, 172:25 municipality [1] - 167:5 municipally [1] - 156:19 muscle [3] - 15:19, 16:7, 17:12 mussels [1] - 72:1 must [17] - 19:20, 20:21, 27:4, 30:17, 30:25, 32:3, 81:3, 90:2, 91:16, 102:16, 122:2, 126:12, 130:9, 133:4, 151:6, 153:9, 172:2	necessary [17] - 7:11, 28:10, 29:12, 33:10, 42:25, 45:10, 49:23, 59:6, 67:11, 83:8, 97:8, 112:19, 133:7, 133:18, 133:22, 133:25, 134:22 necessitating [1] - 126:10 need [24] - 11:6, 15:8, 67:20, 76:1, 85:5, 86:24, 90:13, 92:16, 106:18, 109:14, 114:13, 119:14, 121:22, 125:10, 127:7, 146:24, 153:16, 153:17, 157:18, 161:4, 165:9, 168:10, 175:1, 175:7 needed [8] - 32:12, 43:9, 50:17, 66:19, 74:5, 97:19, 103:20, 131:20 needing [1] - 87:21 needs [4] - 75:21, 118:4, 131:6, 171:25 negotiation [1] - 54:23 NEPA [2] - 9:14, 9:17 never [1] - 134:25 NEW [3] - 1:1, 2:15, 177:1 new [36] - 22:3, 22:4, 22:8, 33:8, 33:20, 41:15, 49:14, 75:21, 75:24, 92:3, 92:4, 92:9, 94:25, 95:8, 96:18, 98:1, 98:5, 99:6, 99:10, 99:15, 103:17, 111:15, 111:18, 112:8, 126:13, 129:6, 140:9, 140:11, 140:19, 141:3, 141:7, 141:11, 141:12, 141:17, 142:6, 151:14 New [78] - 1:18, 2:13, 2:18, 3:6, 3:12, 3:17, 3:22, 4:5, 4:10, 6:19, 6:21, 6:25, 8:16, 10:14, 15:20, 16:8, 16:22, 19:3, 19:6, 19:7, 20:24, 21:3, 21:22, 23:9, 24:13, 24:18, 25:7, 26:24, 26:25, 27:4, 27:17, 27:18, 28:18, 29:3, 30:19, 31:6, 31:12,	34:13, 36:12, 37:2, 37:5, 40:4, 41:16, 50:10, 53:20, 54:9, 56:2, 56:11, 56:24, 59:25, 60:9, 60:13, 61:6, 61:10, 62:5, 63:16, 64:6, 67:13, 68:4, 69:10, 71:19, 72:12, 89:20, 89:25, 97:20, 103:10, 121:10, 121:11, 141:20, 152:18, 155:21, 157:8, 170:25, 171:7, 171:20, 172:5, 173:3, 173:4 newspaper [1] - 36:12 newspapers [3] - 37:4, 58:10, 69:2 next [7] - 21:9, 39:1, 79:24, 96:6, 107:22, 127:3, 127:8 next-to-the-last [1] - 79:24 nine [25] - 26:17, 33:17, 33:23, 33:25, 34:7, 34:9, 73:14, 73:19, 75:3, 75:18, 76:22, 77:2, 79:16, 81:9, 82:7, 87:18, 92:14, 93:7, 152:9, 153:9, 154:3, 156:17, 156:20, 159:10, 162:25 nine-month [1] - 162:25 NMAC [5] - 1:7, 6:20, 41:18, 79:11, 121:24 NMED [3] - 9:11, 11:5, 15:2 NMED's [3] - 105:13, 138:21, 175:23 NOI [3] - 46:5, 82:20, 82:22 non [18] - 7:23, 8:6, 8:23, 56:9, 56:19, 57:10, 59:24, 60:9, 60:15, 60:19, 61:5, 61:12, 75:15, 93:20, 106:22, 107:9, 107:12, 170:13 non-101(a)(2) [1] - 90:14 non-coastal [1] - 93:20 non-fishable/non-swimmable [2] - 106:22, 107:12 non-fishable/
N				
name [16] - 6:16, 8:8, 23:6, 23:8, 39:9, 53:18, 60:12, 63:14, 66:17, 71:18, 73:5, 85:5, 113:17, 156:23, 172:15, 172:21 names [1] - 66:17 narrative [12] - 29:14, 29:15, 29:19, 29:20, 36:24, 121:23, 123:10, 123:11, 166:14, 166:21, 166:25, 167:5 narrow [1] - 161:15 National [11] - 4:2, 4:9, 10:23, 11:17, 11:19, 23:22, 25:8, 35:15, 43:13, 55:2, 56:10 native [6] - 8:23, 8:24, 9:23, 9:25, 68:8, 71:23 natural [12] - 29:22, 57:6, 59:17, 61:21, 67:22, 146:16, 146:19, 147:2, 147:6, 165:10, 165:18, 171:13 naturally [9] - 51:23, 57:14, 59:22, 60:3, 61:1, 61:14, 112:14, 163:9, 165:13 nature [4] - 56:1, 65:22, 72:8, 81:24 near [4] - 43:10, 43:23, 66:13, 116:8 necessarily [4] - 83:7, 89:6, 165:16, 167:3				

KATHY TOWNSEND COURT REPORTERS

110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

(505) 243-5018 - Fax (505) 243-3606

<p>swimmable [1] - 75:15 non-native [1] - 8:23 non-perennial [9] - 56:9, 56:19, 57:10, 59:24, 60:9, 60:15, 60:19, 61:5, 61:12 non-Section [1] - 107:9 non-technical [3] - 7:23, 8:6, 170:13 none [3] - 10:7, 18:14, 175:20 nonetheless [3] - 128:6, 145:24, 147:15 Northeast [1] - 2:12 Northwest [1] - 67:12 NOTARY [1] - 177:18 note [7] - 6:8, 10:7, 13:8, 14:5, 104:11, 133:17, 173:13 noted [3] - 40:24, 75:17, 159:12 notes [5] - 84:4, 86:15, 88:2, 108:9, 122:13 nothing [2] - 87:20, 95:11 notice [19] - 11:11, 11:25, 12:1, 14:24, 15:16, 25:22, 37:1, 37:7, 41:23, 58:11, 69:12, 82:12, 104:12, 137:17, 137:19, 137:22, 138:5, 149:17 noticed [1] - 52:7 notices [7] - 12:18, 36:3, 36:13, 58:5, 58:8, 69:1, 69:2 November [6] - 53:19, 54:10, 69:8, 70:13, 85:25, 160:21 nowhere [1] - 94:2 NPDES [20] - 9:10, 43:14, 47:8, 48:1, 50:24, 56:12, 58:20, 62:9, 115:15, 115:17, 115:20, 117:1, 117:5, 117:9, 125:1, 128:4, 138:22, 143:3, 143:19, 156:19 NPDES-permitted [3] - 56:12, 58:20, 62:9 Number [9] - 46:6, 64:23, 65:9, 77:7, 78:8, 93:10, 93:13, 105:7, 177:19 number [10] - 6:6, 32:23, 50:12, 63:25, 78:13, 79:7, 84:2,</p>	<p>106:4, 116:9, 122:3 numbers [3] - 29:19, 30:3, 41:19 numeric [2] - 29:14, 30:1 numerous [1] - 70:10 nutrient [14] - 24:7, 64:8, 64:18, 121:23, 122:7, 122:10, 122:24, 123:7, 124:11, 124:25, 126:9, 126:22, 166:15, 166:20 Nutrient [1] - 24:13</p> <p style="text-align: center;">O</p> <p>oath [4] - 7:6, 8:9, 170:19, 172:16 Oath [1] - 22:22 object [5] - 12:8, 16:3, 17:20, 74:14, 104:5 objection [8] - 18:4, 77:14, 78:2, 91:5, 103:22, 103:24, 104:15, 128:13 objections [2] - 17:16, 104:11 objectives [3] - 21:25, 22:7, 26:23 objects [1] - 16:1 obligated [4] - 150:25, 155:21, 156:1, 156:4 observations [1] - 34:12 observed [8] - 84:6, 84:8, 84:18, 85:2, 85:9, 85:10, 85:15 obtain [1] - 7:14 obviate [1] - 152:23 obviously [1] - 143:5 occur [6] - 33:11, 80:25, 81:18, 84:11, 88:17, 137:9 occurred [5] - 17:6, 86:2, 116:18, 152:25, 153:3 occurring [8] - 34:9, 34:19, 35:3, 75:18, 81:4, 81:8, 88:11, 89:11 occurs [2] - 34:22, 61:19 October [5] - 1:14, 6:3, 52:15, 52:20, 144:10</p>	<p>OF [5] - 1:1, 1:5, 1:13, 177:1, 177:3 offer [1] - 8:5 offered [4] - 17:14, 17:22, 17:23, 18:11 offering [1] - 13:25 offers [2] - 17:17, 84:19 Office [1] - 4:8 office [1] - 7:17 Officer [38] - 1:16, 6:12, 6:17, 10:13, 11:8, 13:17, 14:13, 16:6, 17:11, 18:3, 18:16, 18:25, 72:24, 73:4, 77:11, 99:19, 99:25, 103:3, 103:15, 104:18, 104:20, 105:23, 113:4, 113:24, 114:22, 115:9, 118:10, 119:1, 120:2, 120:4, 120:12, 128:14, 129:4, 154:17, 155:2, 165:23, 166:8, 169:24 OFFICER [1] - 2:9 officer [4] - 53:20, 63:25, 117:17, 177:4 often [1] - 84:10 oftentimes [1] - 174:23 Ojo [1] - 84:4 Old [1] - 1:18 old [1] - 145:23 omission [2] - 133:14, 148:23 omit [1] - 41:25 omitted [2] - 107:6, 134:6 once [12] - 13:9, 13:14, 14:3, 19:13, 33:2, 46:19, 104:22, 117:10, 138:25, 141:12, 165:8, 173:19 one [37] - 11:18, 15:19, 16:1, 17:3, 24:24, 29:1, 35:18, 46:3, 49:22, 58:18, 58:21, 58:22, 59:14, 70:6, 70:19, 87:23, 93:5, 94:10, 104:1, 114:16, 117:15, 119:12, 122:5, 147:12, 155:3, 166:2, 166:4, 166:19, 167:14, 167:16, 167:18, 167:19, 168:2, 168:5, 173:17, 175:20 ones [1] - 164:7</p>	<p>ongoing [2] - 118:13, 118:18 open [4] - 58:7, 69:5, 88:3, 170:12 opened [2] - 69:8, 160:21 opening [1] - 18:18 Opening [1] - 5:4 operate [1] - 163:5 operated [1] - 64:17 operator [1] - 35:14 operators [1] - 35:8 opinion [1] - 16:19 opportunities [1] - 12:18 opportunity [5] - 7:3, 10:8, 20:19, 99:5, 166:13 opposed [2] - 12:24, 44:7 opposes [1] - 101:24 opposition [3] - 11:23, 12:6, 18:12 option [1] - 102:8 options [2] - 35:18, 166:14 order [12] - 13:3, 14:15, 19:21, 29:11, 36:24, 112:20, 119:23, 131:5, 160:1, 167:9, 167:24 organized [1] - 27:23 original [23] - 38:11, 40:17, 42:12, 42:19, 44:3, 46:12, 50:18, 51:6, 77:9, 78:1, 78:12, 97:15, 106:22, 130:1, 130:7, 130:22, 132:2, 132:25, 133:4, 139:23, 141:10, 141:14, 148:16 originals [1] - 15:8 otherwise [1] - 30:13 outgrowth [1] - 16:25 outline [2] - 53:17, 71:17 outlined [1] - 137:21 outlines [1] - 45:8 outreach [3] - 35:4, 35:21, 36:1 outside [5] - 11:21, 51:18, 64:1, 65:12, 163:6 outstanding [1] - 22:2 overall [1] - 175:15 overnight [1] - 165:21 overprotects [1] -</p>	<p>57:21 oversaw [1] - 24:12 oversight [3] - 53:5, 88:5, 116:14 overview [4] - 26:9, 26:11, 41:12, 173:14 own [10] - 9:10, 9:17, 26:6, 55:21, 80:24, 81:13, 83:14, 84:24, 84:25, 158:10 owned [2] - 85:18, 156:20</p> <p style="text-align: center;">P</p> <p>PA [4] - 3:4, 3:16, 3:21, 4:4 pack [1] - 154:22 PAGE [1] - 5:1 page [29] - 77:7, 77:10, 78:9, 78:16, 78:18, 79:7, 79:22, 83:9, 86:13, 92:7, 93:8, 98:8, 99:14, 102:6, 105:8, 106:3, 109:8, 109:19, 109:20, 110:8, 121:19, 121:24, 122:3, 129:23, 133:3, 133:8, 149:4, 149:22 Pam [1] - 15:5 Panel [4] - 5:15, 5:16, 5:17, 5:18 panel [4] - 21:21, 38:22, 73:11, 123:1 paragraph [11] - 41:19, 49:7, 49:14, 49:25, 50:3, 50:5, 136:2, 136:24, 137:16, 137:17, 137:21 paragraphs [3] - 49:19, 49:25, 50:7 parameter [3] - 100:19, 127:12 paraphrasing [1] - 144:4 Park [1] - 55:2 park [1] - 85:22 PARKHOMENKO [1] - 3:4 Parkhomenko [1] - 11:1 Parkway [1] - 2:12 part [15] - 7:16, 25:22, 55:15, 56:8, 66:12, 105:13, 116:3, 130:15, 136:16, 142:17, 152:13,</p>
--	---	---	--	--

KATHY TOWNSEND COURT REPORTERS

110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

(505) 243-5018 - Fax (505) 243-3606

<p>157:11, 159:1, 162:13, 165:16 Part [1] - 19:7 participating [1] - 13:5 participation [9] - 35:23, 36:17, 68:23, 136:21, 137:3, 137:9, 137:16, 137:23, 138:4 particular [22] - 6:12, 12:10, 16:1, 21:14, 30:2, 57:13, 58:3, 59:16, 85:21, 86:23, 101:23, 126:15, 127:17, 129:17, 131:24, 156:21, 158:18, 162:18, 164:18, 169:6, 174:3 particularly [3] - 59:24, 60:8, 61:11 parties [17] - 7:22, 8:1, 13:5, 13:6, 13:12, 16:14, 17:10, 18:1, 40:18, 58:9, 65:12, 72:20, 104:4, 104:9, 114:24, 177:11, 177:14 parties' [2] - 69:3, 119:22 Partnership [2] - 70:1, 171:3 parts [1] - 11:3 party [3] - 11:13, 13:24, 113:11 Paseo [4] - 3:5, 3:11, 3:22, 4:5 passed [2] - 28:24, 171:12 past [4] - 20:23, 24:4, 117:8, 162:6 path [2] - 168:6, 168:9 pathogen [1] - 29:21 pathogens [1] - 29:22 pathology [1] - 39:21 pathway [1] - 151:12 Patten [14] - 21:22, 22:24, 71:16, 71:18, 113:7, 113:18, 113:19, 114:2, 114:5, 115:11, 119:2, 119:19, 120:6, 120:8 PATTEN [10] - 5:13, 71:11, 115:18, 115:23, 116:22, 116:25, 118:16, 119:5, 119:11, 120:9 Pattison [2] - 118:25, 157:4</p>	<p>PATTISON [12] - 2:7, 118:24, 119:1, 119:10, 119:17, 157:5, 157:23, 158:1, 158:6, 158:13, 158:21, 159:5 PC [1] - 2:11 Peabody [3] - 11:10, 11:11, 13:9 Pecos [7] - 56:15, 58:17, 62:17, 62:23, 86:13, 86:14, 88:1 pending [3] - 53:2, 116:10, 147:14 Penn [1] - 64:11 people [2] - 160:3, 160:8 per [5] - 140:21, 145:4, 149:11, 149:12, 150:9 Peralta [3] - 3:5, 3:22, 4:5 perennial [16] - 56:9, 56:14, 56:19, 56:23, 57:2, 57:10, 59:24, 60:9, 60:15, 60:19, 61:5, 61:6, 61:9, 61:12, 165:14 perform [2] - 106:18, 163:6 performing [1] - 84:11 perhaps [5] - 18:6, 89:6, 95:13, 113:10, 152:1 period [13] - 25:1, 36:9, 52:2, 52:7, 58:8, 58:11, 69:7, 69:14, 139:4, 139:12, 139:21, 163:15, 164:12 periods [1] - 37:14 permit [40] - 9:10, 35:20, 43:23, 44:20, 47:16, 48:1, 115:15, 115:17, 115:20, 116:7, 116:13, 117:1, 117:5, 117:9, 123:11, 123:22, 124:4, 125:1, 127:25, 128:1, 128:5, 139:2, 139:6, 139:7, 139:10, 140:4, 140:6, 140:14, 140:16, 140:20, 142:17, 143:3, 143:12, 143:15, 157:20, 160:20, 166:22, 167:6, 172:8 permits [20] - 9:12, 25:7, 25:9, 35:16,</p>	<p>40:5, 43:15, 47:8, 47:10, 48:5, 50:24, 138:23, 142:24, 143:5, 143:19, 143:23, 156:6, 156:19, 171:24, 174:7 permitted [6] - 25:5, 56:11, 56:12, 58:20, 62:9, 123:9 permittees [1] - 25:6 permitting [7] - 35:19, 123:12, 125:22, 128:2, 145:8, 145:10, 148:24 Perrotte [2] - 170:19, 171:1 PERROTTE [5] - 5:19, 170:18, 170:20, 170:21, 170:25 person [2] - 7:8, 136:24 personal [1] - 83:22 personally [1] - 177:7 personnel [3] - 83:17, 83:20, 84:10 persons [2] - 7:4, 7:7 perspective [1] - 160:25 pertaining [1] - 15:23 petition [39] - 22:8, 32:2, 36:22, 38:9, 38:13, 40:17, 40:20, 42:5, 44:11, 46:14, 48:20, 49:22, 77:4, 77:8, 77:9, 77:17, 77:20, 78:1, 78:12, 79:21, 80:23, 92:14, 97:2, 102:5, 103:19, 106:10, 106:11, 108:25, 117:11, 127:23, 128:18, 132:7, 135:7, 135:24, 136:10, 136:24, 144:11, 166:17, 168:12 petitioned [1] - 36:20 petitioner [16] - 18:15, 46:2, 46:7, 46:14, 124:19, 124:21, 124:22, 127:15, 128:8, 130:9, 131:3, 132:4, 132:9, 132:25, 136:1, 137:15 petitions [1] - 38:11 pH [26] - 144:7, 144:20, 144:22, 145:2, 145:17, 145:21, 146:2, 146:6,</p>	<p>146:8, 146:9, 146:14, 146:19, 146:22, 147:2, 147:5, 147:6, 147:11, 147:12, 147:13, 147:20, 148:7, 150:5, 150:7, 151:19, 151:25 phase [1] - 36:2 PhD [1] - 64:7 phone [1] - 7:20 pHs [1] - 146:16 physical [1] - 28:3 physiology [1] - 39:21 pick [1] - 170:1 picture [2] - 158:14, 158:18 piece [1] - 12:10 pinpoint [1] - 133:9 PINTADO [183] - 5:7, 39:2, 78:6, 78:10, 79:14, 79:19, 80:4, 80:8, 80:13, 80:19, 81:5, 82:1, 83:3, 83:7, 86:1, 91:12, 92:8, 93:11, 93:14, 93:17, 94:1, 94:6, 94:10, 94:15, 95:10, 95:15, 95:21, 96:1, 96:4, 96:7, 96:12, 96:21, 96:25, 97:4, 97:10, 97:17, 97:24, 98:3, 98:6, 98:16, 99:7, 99:11, 100:14, 100:17, 100:25, 101:5, 101:10, 101:19, 101:22, 102:2, 102:10, 102:14, 102:18, 102:25, 105:18, 105:22, 106:12, 112:2, 112:4, 116:24, 118:1, 121:1, 121:6, 121:13, 121:18, 122:1, 122:8, 122:11, 122:15, 122:20, 122:25, 124:5, 125:15, 125:18, 125:23, 126:1, 126:6, 126:12, 126:23, 127:6, 127:14, 127:20, 127:24, 128:9, 129:19, 130:3, 130:9, 130:16, 130:25, 131:8, 131:14, 131:19, 132:4, 132:9, 132:18, 133:1, 133:12, 133:15, 133:20, 133:23, 134:10,</p>	<p>134:23, 135:3, 135:6, 135:13, 135:17, 135:20, 136:4, 136:6, 136:10, 136:16, 136:23, 137:11, 137:15, 138:2, 138:10, 138:14, 138:18, 138:24, 139:4, 139:8, 139:12, 139:16, 139:25, 140:6, 140:13, 140:23, 141:5, 141:16, 141:22, 142:1, 142:6, 142:9, 142:12, 142:17, 142:21, 143:1, 143:13, 143:16, 143:20, 143:24, 144:12, 144:15, 144:18, 144:23, 145:3, 145:9, 145:13, 145:22, 146:3, 148:9, 148:12, 149:2, 149:9, 149:14, 149:20, 149:23, 149:25, 150:14, 150:17, 150:20, 150:23, 151:5, 151:7, 151:13, 151:21, 152:1, 152:11, 152:16, 152:21, 153:1, 153:7, 153:13, 153:20, 153:25, 154:7, 155:18, 156:3, 156:9, 156:12, 157:9, 168:4, 168:21 Pintado [20] - 21:9, 22:23, 33:16, 38:2, 39:9, 41:23, 51:25, 53:7, 77:5, 79:3, 79:6, 95:19, 99:5, 100:12, 120:24, 126:3, 144:9, 147:23, 152:5, 155:14 Pintado's [7] - 77:6, 78:8, 78:22, 92:7, 93:7, 105:24, 128:19 piscicide [14] - 8:21, 11:23, 12:6, 21:12, 21:24, 22:10, 38:1, 41:20, 41:24, 72:10, 72:12, 116:8, 119:14, 120:17 piscicides [5] - 8:19, 116:14, 116:15, 118:13, 118:14 pivot [1] - 144:3 place [8] - 42:12, 66:17, 99:13, 116:13, 122:10, 122:12, 131:25, 167:8</p>
--	---	---	---	--

KATHY TOWNSEND COURT REPORTERS

110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

(505) 243-5018 - Fax (505) 243-3606

<p>placement [1] - 43:12</p> <p>places [2] - 9:16, 175:5</p> <p>plan [38] - 46:11, 49:21, 49:22, 49:24, 128:8, 128:10, 129:15, 129:19, 130:4, 130:6, 131:6, 131:10, 131:16, 131:22, 131:25, 132:7, 132:10, 132:15, 132:17, 132:24, 135:1, 135:5, 135:7, 135:11, 135:16, 136:1, 136:6, 136:10, 136:15, 136:16, 137:25, 138:3, 138:7, 140:20, 141:2, 141:21, 168:11, 169:2</p> <p>planning [3] - 24:10, 24:17, 169:12</p> <p>plans [2] - 174:21, 174:22</p> <p>plant [6] - 39:20, 131:21, 156:25, 157:1, 157:2</p> <p>plants [4] - 35:8, 35:10, 123:16, 156:20</p> <p>play [2] - 27:16, 123:23</p> <p>playa [7] - 119:3, 119:8, 119:12, 158:13, 158:19, 159:1, 159:3</p> <p>plus [1] - 9:14</p> <p>PM [4] - 1:19, 6:5, 103:6, 176:3</p> <p>PO [2] - 3:17, 4:9</p> <p>Point [3] - 25:3, 35:7, 35:13</p> <p>point [14] - 25:6, 41:17, 46:16, 79:5, 97:22, 118:7, 119:12, 119:13, 125:16, 135:14, 154:21, 162:4, 163:11, 170:11</p> <p>pointing [1] - 135:23</p> <p>points [6] - 128:12, 129:17, 129:22, 130:6, 131:18, 132:12</p> <p>policies [2] - 35:20, 128:2</p> <p>policy [1] - 141:21</p> <p>pollutant [8] - 42:11, 46:8, 47:3, 100:19, 126:16, 127:11, 131:2, 139:20</p> <p>Pollutant [4] - 25:8,</p>	<p>35:16, 43:14, 56:10</p> <p>pollutants [1] - 28:6</p> <p>polluters [2] - 171:25, 172:7</p> <p>pollution [5] - 19:17, 40:1, 161:13, 161:18, 172:8</p> <p>ponds [1] - 175:6</p> <p>pools [1] - 83:13</p> <p>Pope [1] - 173:14</p> <p>populations [1] - 8:24</p> <p>portion [4] - 20:24, 55:20, 55:23, 80:24</p> <p>portions [1] - 108:25</p> <p>pose [2] - 76:14, 76:19</p> <p>position [25] - 12:2, 12:22, 15:2, 23:7, 39:8, 39:12, 52:17, 63:17, 64:11, 76:20, 80:5, 80:11, 81:2, 90:23, 93:6, 95:6, 97:18, 101:17, 110:24, 111:7, 111:15, 111:16, 111:18, 121:15, 146:5</p> <p>positions [6] - 11:11, 24:3, 54:22, 55:4, 64:16, 171:2</p> <p>possibility [1] - 88:9</p> <p>possible [7] - 51:25, 81:8, 93:4, 130:2, 130:8, 130:23, 133:5</p> <p>possibly [3] - 81:21, 92:24, 170:1</p> <p>post [1] - 85:24</p> <p>post-1975 [1] - 86:8</p> <p>postdoctoral [1] - 64:9</p> <p>posted [2] - 58:11, 68:25</p> <p>potential [3] - 89:18, 101:7, 101:8</p> <p>potentially [4] - 14:10, 114:3, 114:7, 146:12</p> <p>poverty [1] - 173:17</p> <p>Power [1] - 173:5</p> <p>practicable [1] - 29:2</p> <p>preamble [1] - 97:12</p> <p>precious [1] - 173:19</p> <p>precipitation [2] - 162:15, 163:18</p> <p>preference [1] - 44:6</p> <p>preferences [1] - 68:1</p> <p>prefiled [7] - 25:14, 25:16, 25:25, 40:25, 49:4, 64:20, 65:16</p>	<p>prehearing [3] - 11:6, 18:13, 35:25</p> <p>preliminary [1] - 14:23</p> <p>premise [1] - 141:8</p> <p>preparation [3] - 15:13, 128:7, 154:4</p> <p>prepare [14] - 25:17, 36:2, 38:4, 40:9, 46:2, 55:8, 62:8, 62:16, 65:2, 72:2, 103:7, 132:14, 136:1, 140:20</p> <p>prepared [10] - 14:11, 14:13, 24:9, 38:8, 41:6, 62:20, 65:7, 82:13, 82:18, 129:7</p> <p>preponderance [1] - 67:16</p> <p>present [8] - 6:9, 6:10, 12:19, 21:10, 21:17, 69:11, 171:20, 171:23</p> <p>presentation [1] - 175:24</p> <p>presented [5] - 9:3, 26:22, 36:18, 36:23, 83:25</p> <p>presenting [7] - 7:22, 21:4, 56:4, 65:6, 66:1, 68:2, 69:19</p> <p>preserve [1] - 27:22</p> <p>presumably [1] - 150:19</p> <p>presumption [9] - 30:10, 31:11, 31:23, 80:9, 90:7, 108:15, 111:21, 112:8, 153:15</p> <p>pretty [1] - 164:4</p> <p>prevent [3] - 9:5, 59:18, 61:23</p> <p>previous [4] - 9:3, 73:15, 98:13, 163:19</p> <p>previously [8] - 25:22, 30:7, 41:4, 65:5, 91:16, 95:8, 110:18, 149:5</p> <p>primary [50] - 28:12, 30:21, 34:2, 34:5, 34:16, 34:22, 35:12, 73:16, 73:20, 74:19, 75:9, 75:17, 75:22, 76:2, 76:6, 76:14, 76:24, 78:25, 79:10, 80:1, 80:11, 80:16, 81:22, 82:7, 86:16, 86:21, 87:2, 87:3, 87:9, 87:14, 89:11, 90:9, 92:16, 93:21, 93:25, 107:24, 152:9,</p>	<p>153:3, 153:4, 153:10, 153:17, 153:22, 154:3, 156:18, 159:11, 159:18, 159:24, 160:9</p> <p>principle [1] - 171:12</p> <p>private [2] - 37:16, 85:21</p> <p>privately [1] - 85:18</p> <p>probability [2] - 88:17, 89:16</p> <p>problem [16] - 66:23, 73:2, 100:10, 114:8, 123:12, 123:16, 123:17, 123:21, 146:13, 146:22, 147:4, 147:5, 147:8, 148:17, 148:18, 169:16</p> <p>procedure [13] - 41:15, 42:5, 42:25, 43:4, 43:8, 44:13, 44:24, 45:12, 46:1, 50:17, 102:2, 137:4, 167:11</p> <p>procedures [7] - 8:25, 9:6, 22:8, 22:12, 42:23, 45:15, 51:17</p> <p>proceed [6] - 22:17, 22:19, 38:23, 77:25, 106:14, 120:10</p> <p>Proceed [1] - 106:7</p> <p>proceeding [3] - 14:1, 17:8, 64:21</p> <p>PROCEEDINGS [1] - 1:13</p> <p>Proceedings [1] - 176:3</p> <p>proceedings [1] - 11:3</p> <p>process [26] - 9:17, 9:22, 11:22, 26:11, 32:14, 32:16, 36:15, 45:8, 46:4, 46:16, 51:15, 51:16, 52:25, 112:13, 112:17, 112:19, 117:8, 117:24, 125:22, 138:3, 142:18, 151:14, 151:15, 165:17, 167:9, 168:24</p> <p>processes [2] - 9:14, 50:14</p> <p>professional [5] - 53:17, 54:14, 64:4, 64:22, 71:17</p> <p>professor [2] - 64:14</p> <p>program [3] - 24:23, 25:11, 64:17</p> <p>Program [1] - 24:13</p>	<p>programs [1] - 40:1</p> <p>progress [8] - 44:16, 46:22, 50:1, 97:14, 97:21, 122:24, 123:6, 137:18</p> <p>projects [7] - 43:15, 44:16, 50:25, 131:20, 131:23, 134:16, 134:17</p> <p>prolonged [1] - 76:11</p> <p>promoted [1] - 24:15</p> <p>promulgate [1] - 20:21</p> <p>propagation [2] - 20:7, 27:12</p> <p>proper [4] - 66:16, 66:17, 71:5, 172:4</p> <p>properly [2] - 12:23, 68:9</p> <p>proponent [2] - 131:6, 142:13</p> <p>Proposal [6] - 55:16, 55:21, 56:13, 62:25, 65:7, 65:15</p> <p>proposals [55] - 11:23, 12:7, 21:24, 26:17, 35:5, 35:9, 41:14, 42:13, 43:12, 44:9, 45:8, 46:2, 48:7, 48:18, 48:20, 50:10, 50:23, 58:19, 58:22, 68:2, 87:1, 95:18, 96:9, 97:2, 101:2, 101:15, 102:12, 120:25, 121:3, 121:16, 123:6, 124:2, 124:20, 125:6, 127:10, 128:22, 129:11, 133:15, 137:14, 138:17, 140:22, 141:7, 144:2, 144:3, 144:25, 152:8, 152:12, 158:18, 159:3, 159:4, 162:8, 164:19, 167:11, 171:19, 172:7</p> <p>proposals [17] - 21:12, 26:22, 36:1, 36:12, 36:18, 37:23, 38:1, 39:13, 51:1, 64:1, 66:5, 66:9, 67:10, 68:24, 69:19, 119:2, 128:23</p> <p>propose [3] - 36:5, 68:11, 68:13</p> <p>proposed [50] - 8:20, 9:25, 16:10, 16:24, 20:17, 20:25, 21:4, 35:12, 35:14, 36:8,</p>
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<p>36:19, 36:23, 36:24, 37:11, 37:21, 41:7, 42:4, 43:8, 45:18, 48:2, 51:9, 56:2, 59:9, 60:2, 62:10, 62:18, 65:23, 66:2, 71:5, 72:10, 72:12, 73:15, 75:19, 95:23, 97:19, 98:18, 111:1, 111:10, 116:25, 118:3, 127:22, 131:11, 131:16, 133:11, 135:1, 136:13, 136:18, 138:21, 155:23, 156:1</p> <p>PROPOSED [1] - 1:5</p> <p>proposes [4] - 22:8, 35:1, 51:23, 73:20</p> <p>proposing [4] - 34:1, 101:7, 158:18, 174:22</p> <p>protect [15] - 20:1, 27:1, 27:7, 27:21, 28:10, 29:12, 86:24, 87:21, 152:24, 159:23, 159:25, 171:9, 171:13, 172:2, 175:8</p> <p>protected [2] - 28:20, 28:22</p> <p>protecting [1] - 93:20</p> <p>Protection [1] - 20:14</p> <p>protection [6] - 27:12, 28:25, 42:14, 54:24, 153:5, 153:15</p> <p>protections [1] - 153:10</p> <p>protective [11] - 10:2, 16:23, 25:6, 32:25, 57:13, 144:20, 144:21, 145:19, 146:1, 147:17, 149:1</p> <p>protectors [1] - 171:16</p> <p>protocol [11] - 21:13, 21:18, 32:14, 51:13, 52:3, 56:6, 56:25, 60:6, 112:17, 158:12, 162:12</p> <p>protocols [3] - 24:20, 152:2, 162:13</p> <p>prove [1] - 160:1</p> <p>provide [21] - 7:3, 10:5, 10:8, 22:3, 26:11, 27:6, 45:10, 51:4, 52:2, 57:4, 58:24, 59:13, 70:14, 85:1, 85:19, 97:20, 116:16, 126:8, 128:7,</p>	<p>167:11, 175:19</p> <p>provided [30] - 8:13, 15:17, 31:9, 32:16, 46:22, 61:24, 70:10, 73:17, 76:21, 77:3, 81:14, 81:24, 82:2, 82:5, 83:1, 83:2, 83:6, 83:8, 83:19, 84:15, 85:10, 85:14, 86:19, 89:10, 91:25, 92:10, 97:12, 149:15, 170:23, 172:19</p> <p>provides [9] - 27:12, 27:13, 43:12, 61:8, 74:5, 76:21, 89:25, 135:15, 136:14</p> <p>providing [5] - 72:5, 122:5, 124:2, 153:21, 167:12</p> <p>proving [1] - 74:19</p> <p>provision [11] - 21:12, 47:14, 125:6, 126:4, 128:7, 133:19, 137:23, 142:15, 142:23, 144:4, 166:11</p> <p>provisional [1] - 103:24</p> <p>provisions [7] - 27:22, 41:21, 94:16, 127:5, 143:8, 143:10, 155:3</p> <p>publically [1] - 88:2</p> <p>Public [4] - 5:3, 5:20, 5:22, 171:11</p> <p>public [80] - 7:16, 7:23, 8:2, 8:3, 8:6, 8:13, 9:10, 9:17, 10:6, 10:8, 19:12, 19:20, 20:2, 24:11, 26:21, 27:2, 27:7, 28:10, 28:18, 29:23, 35:22, 36:3, 36:4, 36:8, 36:9, 36:11, 36:13, 36:17, 36:21, 37:14, 37:22, 37:24, 43:6, 45:8, 46:18, 52:2, 52:10, 54:3, 55:9, 58:5, 58:8, 58:11, 68:23, 69:1, 69:5, 69:6, 69:7, 69:9, 69:12, 69:14, 69:16, 83:13, 104:14, 114:4, 118:2, 136:20, 137:3, 137:8, 137:12, 137:16, 137:17, 137:19, 137:24, 138:4, 138:9, 138:16, 151:23, 155:3, 159:23, 160:20, 170:1, 170:13, 170:23, 171:14,</p>	<p>172:13, 172:19, 174:21, 174:23, 175:18</p> <p>PUBLIC [4] - 8:14, 170:24, 172:20, 177:18</p> <p>publicly [3] - 37:19, 52:7, 156:19</p> <p>publish [1] - 155:22</p> <p>published [6] - 36:7, 36:11, 37:2, 37:9, 58:9, 69:1</p> <p>Pueblo [3] - 3:11, 54:20, 54:21</p> <p>pull [1] - 11:20</p> <p>purely [1] - 118:8</p> <p>purpose [6] - 19:1, 27:10, 31:5, 88:10, 89:17, 108:23</p> <p>purposes [19] - 19:17, 20:3, 20:8, 20:9, 27:3, 27:9, 30:16, 62:7, 76:16, 104:24, 144:8, 145:6, 145:16, 145:20, 146:2, 148:2, 149:7, 169:13, 175:9</p> <p>pursuant [2] - 7:2, 131:6</p> <p>purview [1] - 132:5</p> <p>put [2] - 15:5, 138:5</p> <p>putting [1] - 148:17</p>	<p>47:19, 47:25, 49:6, 50:23, 51:5, 51:11, 53:19, 53:23, 54:1, 55:4, 56:3, 57:9, 57:20, 60:13, 63:21, 63:25, 64:1, 65:24, 66:20, 66:25, 68:7, 68:11, 75:14, 88:21, 90:1, 93:19, 93:23, 95:24, 96:13, 96:16, 96:19, 96:22, 96:23, 97:13, 97:16, 97:21, 98:1, 99:8, 99:16, 100:17, 100:19, 100:21, 100:23, 102:1, 102:20, 102:21, 102:23, 121:7, 121:8, 123:20, 126:13, 126:14, 128:4, 132:19, 134:12, 137:2, 138:2, 139:18, 140:16, 147:19, 149:1, 149:6, 151:23, 155:15, 156:3, 169:2, 171:7, 171:21, 172:1, 172:3, 173:7, 173:9</p> <p>QUALITY [2] - 1:2, 2:2</p> <p>Quality [39] - 1:16, 6:4, 6:19, 6:25, 7:1, 19:3, 19:15, 19:16, 19:25, 21:7, 22:21, 23:10, 24:1, 26:25, 27:3, 39:11, 39:25, 43:2, 45:4, 51:3, 52:23, 52:24, 53:21, 55:17, 63:17, 65:9, 65:10, 85:24, 86:8, 89:21, 89:25, 90:24, 91:5, 92:13, 103:10, 107:4, 145:6, 145:20, 171:1</p> <p>quantifies [1] - 162:16</p> <p>quantities [2] - 76:13, 88:18</p> <p>quantity [3] - 29:23, 171:8, 173:8</p> <p>questioning [2] - 18:22, 155:19</p> <p>questions [33] - 13:16, 17:18, 38:18, 73:7, 95:19, 103:2, 112:25, 113:11, 113:16, 114:1, 114:5, 114:9, 114:10, 114:14, 114:20, 115:3, 119:19, 120:6, 128:15, 144:2, 154:9,</p>	<p>154:11, 154:13, 154:19, 155:8, 155:10, 159:5, 159:9, 165:25, 166:9, 169:19, 170:2, 170:7</p> <p>queue [1] - 14:11</p> <p>quick [2] - 155:13, 159:8</p> <p>quicker [1] - 14:3</p> <p>quite [3] - 17:13, 147:24, 173:12</p> <p>quote [6] - 109:17, 121:20, 133:4, 133:6, 149:5, 174:25</p> <p>quoted [5] - 16:14, 109:18, 109:22, 110:8, 110:13</p> <p>quotes [1] - 133:18</p>
R				
<p>rafting [5] - 84:5, 84:15, 84:18, 84:19, 85:2</p> <p>rain [2] - 163:24, 163:25</p> <p>raise [2] - 8:7, 145:18</p> <p>raised [1] - 32:9</p> <p>range [1] - 163:6</p> <p>rather [2] - 108:9, 172:1</p> <p>rationale [1] - 147:25</p> <p>reached [3] - 13:6, 35:8, 62:22</p> <p>reactions [1] - 28:4</p> <p>read [5] - 16:17, 76:7, 93:15, 100:16, 130:17</p> <p>reading [1] - 131:10</p> <p>reads [2] - 29:21, 101:12</p> <p>ready [1] - 13:13</p> <p>real [1] - 57:19</p> <p>really [13] - 9:22, 12:22, 13:13, 114:13, 122:11, 124:17, 153:16, 163:24, 168:14, 171:5, 173:5, 175:3, 175:7</p> <p>reason [6] - 97:22, 101:23, 119:6, 133:13, 143:17, 166:19</p> <p>reasonable [2] - 7:3, 168:24</p> <p>reasons [1] - 166:19</p> <p>rebut [1] - 12:22</p> <p>rebuttable [9] -</p>				

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<p>30:10, 31:11, 31:23, 80:8, 90:7, 108:15, 111:20, 112:8, 153:15</p> <p>Rebuttal [6] - 81:24, 82:6, 82:11, 83:10, 92:11, 109:13</p> <p>rebuttal [11] - 12:20, 14:14, 17:5, 83:1, 83:2, 83:3, 83:4, 83:8, 109:12, 129:7, 129:8</p> <p>receive [3] - 37:10, 58:13, 69:18</p> <p>received [19] - 11:25, 12:21, 37:13, 37:18, 48:7, 52:14, 58:18, 58:21, 58:25, 59:3, 62:3, 69:20, 69:23, 69:25, 70:12, 70:15, 70:20, 75:8, 75:11</p> <p>receiving [7] - 110:17, 112:6, 139:11, 144:7, 150:6, 150:8, 151:18</p> <p>recent [8] - 38:6, 49:5, 67:25, 74:4, 74:8, 95:23, 98:13, 160:23</p> <p>recently [1] - 74:8</p> <p>Recess [1] - 103:6</p> <p>recessed [1] - 176:3</p> <p>reclamation [1] - 47:11</p> <p>reclassification [1] - 22:11</p> <p>recognize [1] - 124:15</p> <p>recognized [1] - 32:23</p> <p>recommend [4] - 129:5, 150:24, 173:25, 175:11</p> <p>recommendation [1] - 174:2</p> <p>recommendations [6] - 87:11, 93:19, 94:12, 126:24, 127:7, 151:15</p> <p>recommended [6] - 49:15, 52:13, 52:21, 102:6, 134:10, 149:18</p> <p>recommends [1] - 150:2</p> <p>reconvene [1] - 6:3</p> <p>record [37] - 6:8, 7:16, 10:11, 15:3, 15:5, 15:10, 31:16, 32:6, 32:10, 37:19, 41:5, 55:13, 65:7, 65:19, 91:10, 98:23, 103:5, 103:10,</p>	<p>103:12, 104:23, 105:3, 105:13, 106:6, 106:20, 107:14, 108:13, 109:22, 109:23, 110:2, 110:7, 110:9, 110:10, 110:18, 110:21, 111:22, 112:6, 177:9</p> <p>recorded [2] - 7:13, 177:8</p> <p>records [3] - 34:11, 68:7, 105:13</p> <p>recoverable [2] - 144:6, 150:9</p> <p>recreation [20] - 22:10, 27:13, 28:13, 30:21, 34:2, 34:3, 34:6, 34:8, 34:17, 34:19, 34:22, 57:25, 75:17, 81:7, 81:20, 85:19, 89:14, 93:21, 94:23, 159:24</p> <p>recreational [11] - 20:8, 26:17, 35:2, 76:10, 87:12, 88:15, 88:19, 88:23, 93:9, 93:18</p> <p>rectified [1] - 116:12</p> <p>rectify [1] - 116:10</p> <p>reducing [1] - 139:20</p> <p>reduction [1] - 147:13</p> <p>reevaluated [1] - 161:4</p> <p>reevaluation [3] - 50:4, 70:5, 70:7</p> <p>refer [10] - 13:3, 19:4, 30:13, 41:17, 56:12, 57:17, 93:8, 103:20, 116:15, 133:16</p> <p>reference [5] - 17:4, 105:15, 105:25, 143:18, 148:25</p> <p>referenced [5] - 16:13, 104:3, 105:19, 105:20, 106:9</p> <p>references [3] - 77:15, 143:19, 159:12</p> <p>referred [5] - 42:7, 82:25, 97:25, 103:18, 151:23</p> <p>referring [9] - 91:1, 98:17, 105:3, 105:17, 129:23, 148:23, 149:4, 162:11, 168:17</p> <p>refers [1] - 125:21</p> <p>refine [1] - 59:10</p> <p>refined [2] - 22:14, 43:21</p>	<p>refinement [2] - 67:11, 68:3</p> <p>refining [1] - 50:15</p> <p>reflect [2] - 22:3, 100:20</p> <p>refresh [1] - 160:14</p> <p>refused [2] - 107:16, 107:20</p> <p>regard [8] - 75:3, 83:11, 85:17, 86:12, 87:25, 89:1, 93:6, 109:7</p> <p>regarding [19] - 16:10, 16:20, 17:5, 56:2, 58:23, 65:7, 65:14, 65:23, 66:6, 69:24, 71:4, 120:17, 126:4, 128:19, 129:10, 135:1, 146:6, 149:17, 161:4</p> <p>regimes [3] - 28:4, 67:22, 161:11</p> <p>Region [10] - 61:18, 61:20, 61:24, 62:2, 62:4, 70:10, 70:13, 70:23, 111:23, 123:18</p> <p>region [2] - 124:15, 162:18</p> <p>regional [2] - 68:16, 68:19</p> <p>Register [4] - 36:12, 37:3, 98:8, 105:7</p> <p>regs [2] - 130:20, 155:15</p> <p>regular [1] - 36:21</p> <p>regularly [1] - 42:7</p> <p>regulated [2] - 122:21, 123:4</p> <p>Regulation [2] - 25:3, 35:7</p> <p>regulation [4] - 31:22, 96:2, 98:2, 155:25</p> <p>regulations [27] - 19:10, 26:20, 27:6, 28:21, 28:25, 30:9, 30:14, 30:22, 33:6, 41:24, 44:5, 45:1, 45:9, 47:6, 47:17, 47:23, 48:1, 49:11, 51:2, 59:16, 95:24, 101:11, 108:14, 116:17, 128:1, 140:15, 143:2</p> <p>Regulations [1] - 7:1</p> <p>regulatory [7] - 43:1, 43:18, 45:20, 49:6, 50:13, 51:4, 62:7</p> <p>reiterate [1] - 60:1</p> <p>reject [2] - 171:21,</p>	<p>172:5</p> <p>rejected [2] - 111:14, 150:19</p> <p>rejection [2] - 145:15, 150:22</p> <p>relate [5] - 26:12, 29:8, 30:7, 31:11, 128:23</p> <p>related [14] - 21:8, 26:14, 28:11, 28:14, 35:4, 39:14, 39:17, 42:20, 53:24, 55:21, 59:7, 147:11, 164:22, 177:11</p> <p>relates [2] - 14:17, 161:9</p> <p>relative [3] - 141:25, 162:17, 177:13</p> <p>release [2] - 69:6, 161:3</p> <p>released [2] - 93:17, 93:18</p> <p>releases [1] - 36:13</p> <p>relevant [2] - 23:16, 128:21</p> <p>relies [2] - 66:15, 83:16</p> <p>religious [1] - 76:16</p> <p>rely [2] - 83:6, 127:18</p> <p>relying [1] - 83:12</p> <p>remainder [1] - 68:15</p> <p>remains [4] - 33:21, 42:12, 42:20, 44:17</p> <p>remediation [1] - 134:16</p> <p>remedy [3] - 146:14, 147:4, 148:17</p> <p>remember [1] - 122:4</p> <p>REMEMBERED [1] - 1:14</p> <p>remind [2] - 8:3, 13:6</p> <p>remiss [1] - 103:16</p> <p>removal [3] - 8:22, 32:1, 49:13</p> <p>removed [2] - 29:4, 48:24</p> <p>render [1] - 22:5</p> <p>renewed [3] - 139:6, 139:10, 169:15</p> <p>renumbered [1] - 50:8</p> <p>renumbering [1] - 68:15</p> <p>repetition [1] - 7:12</p> <p>rephrase [2] - 91:2, 142:1</p> <p>replaced [1] - 29:6</p> <p>replaces [1] - 48:21</p> <p>report [10] - 16:19,</p>	<p>46:22, 50:1, 51:22, 52:4, 52:10, 52:12, 52:15, 52:20, 53:1</p> <p>reporter [1] - 7:15</p> <p>Reporters [1] - 7:14</p> <p>represent [2] - 11:2, 166:13</p> <p>representative [1] - 165:18</p> <p>representing [2] - 10:19, 10:21</p> <p>represents [1] - 42:14</p> <p>request [5] - 36:16, 36:25, 46:15, 69:4, 171:18</p> <p>requests [1] - 50:6</p> <p>require [14] - 9:7, 28:21, 28:25, 29:3, 30:15, 30:23, 33:6, 49:15, 59:4, 74:19, 74:24, 75:2, 134:17, 154:4</p> <p>required [18] - 20:13, 28:20, 33:19, 50:3, 59:12, 59:13, 75:13, 75:15, 90:16, 91:22, 92:17, 117:6, 126:10, 129:20, 129:21, 137:4, 137:16, 156:6</p> <p>requirement [6] - 33:13, 48:24, 125:11, 138:13, 152:24, 167:24</p> <p>requirements [14] - 33:2, 35:22, 40:2, 43:3, 45:9, 45:18, 48:4, 48:10, 49:8, 49:24, 54:3, 128:1, 135:25, 153:9</p> <p>requires [7] - 19:11, 130:1, 130:12, 130:17, 131:10, 138:3, 152:18</p> <p>requiring [3] - 59:10, 110:20, 125:6</p> <p>rescheduled [1] - 12:16</p> <p>research [5] - 23:21, 55:2, 64:14, 64:17, 171:22</p> <p>researching [1] - 54:2</p> <p>Reservoir [3] - 86:14, 86:15, 86:20</p> <p>resolution [2] - 11:14, 147:15</p> <p>resolve [7] - 17:23, 22:1, 112:9, 112:12, 123:14, 150:2, 151:3</p>
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KATHY TOWNSEND COURT REPORTERS

110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

(505) 243-5018 - Fax (505) 243-3606

<p>resolved [2] - 70:11, 118:21</p> <p>resolving [3] - 147:12, 147:13, 151:4</p> <p>resource [2] - 54:20, 171:9</p> <p>resources [1] - 171:14</p> <p>respect [3] - 79:16, 79:22, 90:23</p> <p>respectively [1] - 68:7</p> <p>responding [1] - 54:3</p> <p>response [5] - 38:6, 59:2, 95:7, 107:23, 124:9</p> <p>responses [5] - 37:18, 58:24, 59:4, 65:13, 70:14</p> <p>responsibilities [3] - 53:17, 55:5, 71:17</p> <p>responsibility [1] - 24:7</p> <p>responsible [4] - 19:18, 53:22, 61:16, 63:19</p> <p>rest [2] - 67:2, 114:23</p> <p>restate [1] - 106:24</p> <p>restoration [10] - 10:1, 43:15, 44:16, 44:21, 45:16, 47:10, 49:13, 50:24, 97:9, 134:16</p> <p>restore [2] - 8:24, 9:22</p> <p>result [9] - 11:13, 41:23, 44:12, 48:15, 67:21, 81:8, 112:18, 139:5, 139:10</p> <p>resulting [4] - 40:19, 61:17, 150:10, 162:8</p> <p>results [7] - 51:21, 52:6, 58:3, 151:9, 163:3, 163:8, 165:6</p> <p>resume [6] - 25:14, 25:16, 40:7, 55:6, 64:20, 64:22</p> <p>returned [1] - 25:2</p> <p>reverse [1] - 171:20</p> <p>reverting [2] - 145:23, 174:2</p> <p>Review [3] - 6:19, 19:2, 110:4</p> <p>review [70] - 6:21, 9:11, 9:14, 11:14, 11:21, 12:14, 19:12, 19:13, 20:15, 21:6, 22:1, 22:2, 22:13,</p>	<p>25:18, 26:11, 31:13, 32:9, 33:6, 33:11, 33:12, 33:14, 33:16, 33:19, 34:15, 35:23, 36:2, 36:15, 36:22, 37:14, 44:8, 46:13, 46:18, 46:24, 50:3, 52:7, 69:13, 73:24, 74:9, 75:14, 75:15, 75:16, 75:24, 90:12, 91:4, 91:18, 94:20, 98:24, 99:6, 107:4, 107:15, 107:22, 108:13, 108:24, 109:1, 110:24, 111:11, 111:12, 115:21, 120:20, 127:6, 128:2, 136:7, 137:17, 137:18, 137:24, 138:8, 138:9, 142:18, 173:12</p> <p>reviewed [7] - 25:7, 34:12, 61:24, 63:2, 65:12, 99:7, 121:4</p> <p>reviewing [1] - 24:18</p> <p>reviews [4] - 34:12, 46:23, 50:6, 140:14</p> <p>revise [2] - 50:14, 92:6</p> <p>revised [6] - 38:9, 52:12, 77:17, 77:20, 94:25, 106:9</p> <p>revising [1] - 19:19</p> <p>revision [1] - 33:9</p> <p>revisions [9] - 20:12, 21:1, 32:8, 32:11, 36:5, 40:4, 53:5, 94:18, 94:20</p> <p>rights [1] - 54:24</p> <p>Rio [4] - 80:24, 83:11, 84:3, 84:20</p> <p>Riparian [1] - 23:22</p> <p>risk [7] - 9:5, 76:13, 80:24, 81:1, 81:13, 83:14, 89:18</p> <p>river [2] - 37:14, 81:17</p> <p>River [15] - 22:15, 56:15, 58:17, 62:17, 62:24, 65:8, 66:13, 66:14, 67:12, 68:4, 69:8, 86:13, 86:14, 88:1, 160:24</p> <p>rivers [4] - 27:20, 56:24, 61:10, 172:9</p> <p>role [2] - 27:16, 148:24</p> <p>Room [1] - 1:17</p> <p>ROSE [7] - 3:20, 10:20, 14:12, 17:11,</p>	<p>104:11, 113:24, 154:13</p> <p>Rose [1] - 10:20</p> <p>Rose's [2] - 18:5, 104:16</p> <p>rule [36] - 9:25, 17:4, 17:8, 26:20, 45:20, 49:7, 72:11, 72:12, 96:18, 97:3, 97:7, 97:12, 98:2, 98:5, 98:18, 98:19, 99:1, 99:6, 99:10, 99:15, 99:22, 101:20, 103:17, 103:21, 104:6, 104:12, 105:18, 129:1, 134:11, 137:4, 138:3, 143:2, 155:23, 156:2</p> <p>Rule [2] - 7:1, 8:18</p> <p>rule-making [3] - 17:8, 137:4, 138:3</p> <p>Rule-Making [1] - 7:1</p> <p>rules [5] - 9:7, 116:13, 117:2, 121:16, 140:14</p> <p>run [1] - 119:23</p> <p>Runnels [1] - 2:18</p> <p>RWQC [1] - 93:19</p>	<p>43:22, 47:14, 50:16, 122:23, 123:8, 123:19, 124:10, 124:17, 124:23, 125:13, 125:25, 126:1, 126:4</p> <p>scheduling [3] - 13:3, 36:24, 165:24</p> <p>Schlenker [2] - 5:17, 10:18</p> <p>SCHLENKER [138] - 3:10, 10:17, 14:8, 15:15, 16:5, 99:19, 99:24, 103:23, 114:21, 120:7, 120:11, 120:21, 120:22, 121:2, 121:8, 121:14, 121:19, 122:2, 122:9, 122:18, 122:21, 123:2, 124:1, 124:6, 124:19, 125:4, 125:16, 125:20, 125:24, 126:3, 126:7, 126:18, 127:4, 127:9, 127:16, 127:21, 128:6, 128:10, 128:20, 129:9, 129:15, 129:21, 130:4, 130:14, 130:21, 131:4, 131:9, 131:15, 131:23, 132:6, 132:11, 132:22, 133:2, 133:13, 133:17, 133:21, 134:3, 134:19, 134:24, 135:4, 135:9, 135:14, 135:18, 136:5, 136:8, 136:12, 136:18, 137:5, 137:12, 137:22, 138:6, 138:11, 138:15, 138:19, 138:25, 139:5, 139:9, 139:14, 139:22, 140:1, 140:8, 140:17, 140:24, 141:6, 141:19, 141:23, 142:2, 142:8, 142:10, 142:13, 142:19, 142:22, 143:7, 143:14, 143:17, 143:21, 143:25, 144:13, 144:16, 144:21, 144:24, 145:5, 145:11, 145:15, 145:24, 146:4, 146:21, 147:7, 147:14, 147:23, 148:10, 148:22, 149:3, 149:10,</p>	<p>149:15, 149:21, 149:24, 150:1, 150:15, 150:18, 150:21, 151:2, 151:6, 151:8, 151:17, 151:22, 152:4, 152:12, 152:17, 152:22, 153:2, 153:8, 153:14, 153:21, 154:2, 154:8, 155:2, 155:7</p> <p>Schlenker-Goodrich [2] - 5:17, 10:18</p> <p>SCHLENKER-GOODRICH [138] - 3:10, 10:17, 14:8, 15:15, 16:5, 99:19, 99:24, 103:23, 114:21, 120:7, 120:11, 120:21, 120:22, 121:2, 121:8, 121:14, 121:19, 122:2, 122:9, 122:18, 122:21, 123:2, 124:1, 124:6, 124:19, 125:4, 125:16, 125:20, 125:24, 126:3, 126:7, 126:18, 127:4, 127:9, 127:16, 127:21, 128:6, 128:10, 128:20, 129:9, 129:15, 129:21, 130:4, 130:14, 130:21, 131:4, 131:9, 131:15, 131:23, 132:6, 132:11, 132:22, 133:2, 133:13, 133:17, 133:21, 134:3, 134:19, 134:24, 135:4, 135:9, 135:14, 135:18, 136:5, 136:8, 136:12, 136:18, 137:5, 137:12, 137:22, 138:6, 138:11, 138:15, 138:19, 138:25, 139:5, 139:9, 139:14, 139:22, 140:1, 140:8, 140:17, 140:24, 141:6, 141:19, 141:23, 142:2, 142:8, 142:10, 142:13, 142:19, 142:22, 143:7, 143:14, 143:17, 143:21, 143:25, 144:13, 144:16, 144:21, 144:24, 145:5, 145:11, 145:15, 145:24, 146:4, 146:21, 147:7, 147:14, 147:23, 148:10, 148:22, 149:3, 149:10,</p>
S				
		<p>safe [1] - 159:16</p> <p>safely [1] - 9:2</p> <p>Salt [1] - 86:14</p> <p>San [14] - 3:14, 10:15, 13:10, 22:15, 48:16, 49:10, 49:20, 50:2, 69:16, 70:1, 70:3, 70:4, 70:8, 73:6</p> <p>Sandia [1] - 54:20</p> <p>Santa [8] - 1:18, 2:18, 3:6, 3:22, 4:5, 37:5, 54:21</p> <p>Sarabia [5] - 55:18, 55:19, 62:21, 62:23, 65:11</p> <p>Sarabia's [3] - 55:23, 56:13, 65:15</p> <p>satisfaction [1] - 61:20</p> <p>SAUCEDO [1] - 2:11</p> <p>saw [1] - 84:15</p> <p>SAYER [1] - 2:5</p> <p>schedule [4] - 47:15, 124:4, 124:14, 125:7</p> <p>scheduled [2] - 13:10, 14:6</p> <p>schedules [13] -</p>		

KATHY TOWNSEND COURT REPORTERS

110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

(505) 243-5018 - Fax (505) 243-3606

<p>145:24, 146:4, 146:21, 147:7, 147:14, 147:23, 148:10, 148:22, 149:3, 149:10, 149:15, 149:21, 149:24, 150:1, 150:15, 150:18, 150:21, 151:2, 151:6, 151:8, 151:17, 151:22, 152:4, 152:12, 152:17, 152:22, 153:2, 153:8, 153:14, 153:21, 154:2, 154:8, 155:2, 155:7</p> <p>scholar [1] - 64:9 school [2] - 23:24, 25:1</p> <p>science [7] - 23:17, 23:18, 23:24, 25:2, 39:19, 39:20</p> <p>Science [2] - 23:23 science's [1] - 54:17 sciences [1] - 64:18 scientific [11] - 9:4, 19:24, 31:4, 45:6, 59:6, 59:11, 59:14, 90:2, 90:5, 91:20, 160:7</p> <p>scientifically [2] - 32:5, 160:5 scientist [3] - 24:6, 39:25, 63:15 scientists [1] - 21:17 scoping [1] - 36:1 scuba [1] - 34:16 seasonal [2] - 88:20, 164:21</p> <p>seat [1] - 170:17 second [14] - 14:23, 15:21, 16:12, 22:3, 38:9, 49:24, 56:13, 66:4, 67:11, 77:17, 77:20, 103:19, 106:10, 148:15</p> <p>Secondary [1] - 111:5</p> <p>secondary [43] - 31:14, 32:12, 33:18, 33:23, 34:2, 58:1, 60:4, 73:16, 73:21, 74:7, 74:14, 74:25, 86:9, 87:13, 88:13, 88:23, 89:22, 90:5, 90:17, 91:7, 91:17, 92:15, 92:20, 92:22, 93:1, 94:4, 94:12, 94:22, 107:5, 107:17, 108:6, 109:2, 110:19,</p>	<p>110:25, 111:9, 112:22, 152:14, 152:23, 153:19, 156:18, 159:11, 160:2, 160:8</p> <p>section [7] - 41:18, 66:12, 67:1, 99:8, 125:12, 125:17, 129:16</p> <p>Section [33] - 19:10, 20:13, 24:17, 24:24, 25:4, 25:9, 25:12, 27:14, 31:6, 31:18, 41:15, 41:21, 42:4, 44:19, 45:4, 46:21, 47:9, 51:8, 51:11, 53:6, 79:8, 87:12, 92:5, 99:14, 107:9, 108:6, 111:2, 111:10, 135:1, 136:23, 142:22, 144:3</p> <p>Sections [5] - 40:22, 41:10, 45:1, 47:19, 94:23</p> <p>sections [3] - 21:14, 41:18, 68:12</p> <p>Security [1] - 4:2</p> <p>see [19] - 67:1, 79:13, 91:22, 92:2, 93:3, 95:3, 98:14, 99:2, 99:17, 110:4, 113:10, 124:23, 125:7, 138:4, 139:17, 155:11, 163:25, 168:16, 174:8</p> <p>seeing [4] - 10:7, 18:14, 163:8, 175:20</p> <p>seek [3] - 32:1, 112:7, 132:14</p> <p>seeking [1] - 140:20 seeks [1] - 44:11 segment [50] - 11:19, 13:20, 22:5, 28:2, 28:8, 59:22, 60:13, 66:3, 66:10, 68:12, 68:13, 68:14, 68:15, 68:16, 68:22, 69:5, 69:21, 73:25, 78:23, 79:22, 80:21, 81:12, 81:19, 83:11, 83:16, 83:18, 83:21, 84:2, 84:5, 84:19, 85:17, 85:21, 86:12, 86:13, 86:16, 86:20, 87:7, 87:25, 91:23, 120:18, 127:13, 127:17, 127:22, 129:18, 130:24, 131:1, 132:13, 140:10, 141:13</p>	<p>segment's [1] - 70:6 segment-specific [1] - 22:5</p> <p>segments [62] - 21:15, 21:19, 26:18, 27:24, 33:17, 33:24, 33:25, 34:7, 34:9, 35:3, 56:10, 57:23, 59:7, 60:2, 62:6, 62:9, 62:13, 62:17, 62:23, 63:3, 67:19, 67:23, 67:24, 68:5, 71:5, 73:14, 73:19, 73:23, 74:6, 74:13, 75:3, 75:9, 75:14, 75:18, 76:22, 77:2, 79:17, 80:20, 81:9, 81:19, 82:8, 84:13, 84:20, 87:18, 90:10, 91:10, 91:19, 92:14, 93:7, 95:1, 95:4, 106:19, 108:1, 109:1, 152:9, 152:15, 153:9, 153:22, 154:3, 154:6, 162:2</p> <p>select [1] - 163:21 selenium [1] - 126:25</p> <p>Semi [1] - 23:22</p> <p>sense [3] - 17:23, 122:18, 159:22</p> <p>sent [3] - 20:14, 37:7, 58:8</p> <p>sentence [4] - 79:24, 93:16, 111:5, 111:6</p> <p>September [8] - 13:3, 38:9, 38:12, 41:1, 41:8, 77:17, 84:12, 96:3</p> <p>serve [7] - 20:3, 27:3, 27:8, 29:16, 29:20, 30:16, 175:9</p> <p>served [2] - 24:22, 25:11</p> <p>serves [2] - 28:8, 47:24</p> <p>Service [2] - 55:1, 55:2</p> <p>servicing [1] - 25:2</p> <p>set [6] - 13:7, 29:11, 32:8, 93:7, 115:19, 116:25</p> <p>sets [2] - 111:6, 117:20</p> <p>setting [3] - 27:21, 28:9, 68:8</p> <p>several [6] - 22:11, 42:24, 69:2, 82:19, 166:9, 166:15</p> <p>severe [2] - 164:5,</p>	<p>165:4</p> <p>shall [9] - 19:22, 20:1, 20:4, 27:1, 29:4, 29:22, 92:6, 101:3, 136:1</p> <p>shellfish [1] - 27:13 Shelly [4] - 21:8, 22:21, 22:22, 23:8</p> <p>SHELLY [2] - 5:5, 23:1</p> <p>shoot [1] - 116:1 short [4] - 32:1, 42:15, 73:1, 73:7</p> <p>shorter [1] - 68:14 shorthand [1] - 177:8</p> <p>shortly [1] - 32:17 shot [1] - 116:22</p> <p>show [2] - 76:2, 112:20</p> <p>showing [4] - 75:21, 80:6, 82:7, 153:11</p> <p>shown [1] - 44:6 shows [2] - 38:5, 76:22</p> <p>Si' [1] - 173:15 sic [1] - 114:8</p> <p>signed [2] - 7:18, 7:24</p> <p>significance [1] - 70:24</p> <p>significant [8] - 34:18, 37:25, 40:21, 41:9, 49:13, 76:14, 76:19, 163:3</p> <p>significantly [1] - 10:2</p> <p>silence [1] - 7:20 similar [4] - 28:3, 28:4, 68:2, 117:23</p> <p>similarly [1] - 94:24 simply [6] - 16:7, 56:12, 57:17, 86:15, 133:21, 140:21</p> <p>single [1] - 132:13 Sister [1] - 172:22</p> <p>Sisters [1] - 171:3 sit [2] - 21:23, 172:15</p> <p>site [9] - 43:19, 50:15, 50:20, 56:17, 57:14, 61:2, 157:15, 157:19, 158:9</p> <p>site-specific [7] - 43:19, 50:15, 50:20, 56:17, 61:2, 157:19, 158:9</p> <p>situation [3] - 116:18, 125:9, 174:10</p> <p>situations [1] - 124:16</p>	<p>six [8] - 6:6, 69:22, 79:8, 95:1, 162:24, 164:12, 168:2, 168:5</p> <p>six-month [1] - 164:12</p> <p>skiing [1] - 76:12 slope [2] - 139:23, 140:2</p> <p>slow [1] - 9:22 small [3] - 175:5, 175:6, 175:8</p> <p>snowmelt [1] - 164:22</p> <p>snowpack [2] - 164:11, 164:15</p> <p>soaking [1] - 34:16 soil [3] - 64:18, 162:24, 163:23</p> <p>solely [1] - 83:12 solubility [1] - 147:10</p> <p>solutions [1] - 171:22</p> <p>someone [2] - 119:6, 123:1</p> <p>sometimes [3] - 173:20, 174:9, 175:6</p> <p>somewhat [1] - 9:9 somewhere [1] - 159:20</p> <p>soon [5] - 100:5, 130:1, 130:8, 130:22, 133:5</p> <p>sorry [17] - 54:13, 78:13, 80:22, 96:15, 99:13, 103:11, 108:8, 109:12, 122:1, 122:15, 125:23, 126:5, 130:14, 130:19, 135:22, 158:16, 165:22</p> <p>sort [2] - 75:8, 139:22</p> <p>sound [1] - 71:3 Source [3] - 25:3, 35:7, 35:13</p> <p>source [1] - 25:7 Southern [1] - 70:1 Southwest [1] - 158:11</p> <p>Southwestern [2] - 68:4, 70:2</p> <p>Spanish [1] - 37:3 speaking [4] - 12:15, 119:5, 119:11, 171:2</p> <p>speaks [2] - 125:13, 161:15</p> <p>specialist [1] - 55:3 species [7] - 15:20, 16:7, 16:8, 16:23,</p>
--	--	--	---	--

KATHY TOWNSEND COURT REPORTERS

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<p>71:24, 145:19, 147:1 specific [35] - 22:5, 28:9, 29:10, 30:2, 32:14, 35:5, 36:17, 42:11, 43:19, 44:2, 47:3, 50:15, 50:20, 56:17, 59:20, 60:12, 60:16, 61:2, 66:24, 67:2, 67:7, 73:25, 85:5, 93:1, 100:19, 127:11, 127:12, 135:11, 150:3, 157:16, 157:19, 158:9, 158:17, 159:2, 161:25 specifically [14] - 29:16, 30:14, 57:10, 60:12, 67:19, 94:21, 133:19, 134:6, 135:5, 135:15, 144:2, 148:3, 157:25, 162:14 specified [3] - 71:6, 92:5, 135:21 specifying [2] - 150:4, 151:17 SPI [1] - 163:18 Spirituality [1] - 171:4 sport [2] - 71:23, 119:8 Springs [3] - 66:13, 67:6, 84:4 springs [3] - 81:16, 85:18, 85:23 ss [1] - 177:2 St [1] - 2:17 staff [12] - 34:13, 35:7, 35:13, 35:17, 36:16, 54:23, 81:18, 84:18, 85:1, 85:3, 85:4, 85:9 stakeholder [1] - 24:12 stamp [1] - 15:8 stamped [1] - 15:6 stand [1] - 21:20 standard [146] - 16:22, 27:24, 33:17, 42:7, 42:8, 42:9, 42:11, 42:12, 42:14, 42:17, 42:19, 42:25, 43:1, 43:4, 43:8, 43:10, 43:16, 44:1, 44:3, 44:13, 45:11, 45:25, 46:3, 46:9, 46:12, 46:17, 46:20, 46:25, 47:2, 47:7, 47:16, 47:18, 47:21, 47:24, 47:25, 48:3, 48:7, 48:21, 48:23,</p>	<p>49:1, 50:22, 51:6, 95:12, 96:9, 96:24, 97:19, 101:13, 101:25, 102:7, 102:13, 102:16, 102:21, 102:23, 102:24, 121:3, 121:22, 122:6, 123:21, 124:3, 124:20, 125:3, 125:10, 125:22, 126:14, 126:20, 127:14, 127:18, 127:19, 127:23, 127:25, 128:3, 128:4, 128:25, 129:25, 130:1, 130:7, 130:10, 130:13, 130:22, 131:3, 131:5, 131:12, 132:1, 132:2, 132:3, 132:14, 132:16, 132:19, 132:21, 133:4, 133:6, 133:10, 133:24, 133:25, 134:2, 134:18, 135:7, 135:10, 135:12, 135:19, 135:24, 136:15, 136:17, 136:25, 137:1, 137:2, 137:6, 137:7, 138:22, 139:1, 139:3, 139:15, 139:17, 139:21, 139:24, 140:5, 140:9, 140:10, 140:13, 140:16, 140:22, 141:1, 141:7, 141:10, 141:14, 141:15, 141:20, 141:24, 142:3, 142:14, 142:16, 142:20, 143:9, 143:11, 145:6, 167:17, 167:25, 168:3, 168:8, 171:19, 171:21, 171:22, 172:6, 173:25 standardize [1] - 24:20 standardized [2] - 162:15, 163:17 STANDARDS [1] - 1:6 Standards [7] - 6:19, 19:3, 24:16, 24:24, 25:12, 89:21, 103:11 standards [132] - 15:23, 16:11, 16:21, 19:5, 19:6, 19:14, 19:19, 19:21, 19:23, 20:1, 20:4, 20:12, 20:18, 20:21, 20:25,</p>	<p>21:4, 21:10, 21:11, 22:5, 22:9, 26:12, 26:24, 27:1, 27:4, 27:6, 27:7, 27:17, 27:18, 27:23, 28:1, 29:3, 29:5, 29:9, 29:13, 30:15, 30:17, 31:7, 31:17, 33:1, 33:5, 33:10, 35:19, 36:6, 38:1, 39:10, 39:14, 40:4, 41:15, 42:23, 43:9, 43:25, 44:4, 44:5, 44:6, 44:10, 44:14, 44:24, 44:25, 45:2, 45:3, 45:6, 45:15, 45:16, 45:17, 45:19, 47:4, 47:13, 48:11, 48:18, 49:6, 49:16, 50:10, 50:18, 51:11, 54:1, 56:3, 57:9, 60:13, 63:20, 63:21, 65:24, 76:6, 88:22, 90:1, 92:6, 95:18, 95:24, 96:13, 96:17, 96:19, 96:23, 97:13, 97:16, 97:21, 98:1, 99:8, 99:16, 100:17, 100:21, 100:23, 102:1, 102:20, 120:25, 121:7, 121:15, 122:13, 123:6, 125:6, 125:13, 126:11, 127:10, 134:13, 136:19, 137:13, 138:16, 141:17, 149:7, 151:24, 152:1, 155:15, 156:4, 158:5, 164:20, 166:11, 169:15, 173:23, 173:24, 174:3, 174:7, 174:14, 175:2, 175:12 standing [1] - 14:5 start [6] - 42:3, 72:21, 73:13, 108:11, 115:3, 163:3 started [1] - 6:2 starting [4] - 77:7, 124:14, 124:15, 164:5 STATE [2] - 1:1, 177:1 state [54] - 8:8, 8:16, 19:9, 19:11, 19:15, 19:17, 19:23, 20:12, 20:19, 20:20, 20:22, 21:4, 23:6, 27:25, 28:17, 29:22, 29:25, 33:5, 33:19, 37:5, 44:23, 47:7, 50:12,</p>	<p>54:2, 60:11, 72:1, 76:16, 78:23, 80:22, 81:12, 92:5, 94:16, 94:17, 102:8, 121:21, 126:12, 137:20, 145:6, 145:11, 145:13, 145:20, 146:6, 148:4, 149:3, 150:25, 157:7, 157:10, 157:12, 158:7, 159:2, 172:2, 172:15, 174:18 State [9] - 1:17, 19:2, 39:21, 50:10, 64:11, 97:20, 150:3, 155:21, 173:3 state's [4] - 28:7, 43:4, 48:9, 121:22 statement [11] - 18:18, 77:8, 77:20, 78:22, 79:21, 81:15, 85:9, 87:16, 87:21, 88:4, 92:3 Statement [1] - 5:4 states [13] - 26:25, 27:6, 28:16, 30:15, 45:2, 45:12, 45:14, 59:17, 80:23, 101:2, 133:21, 136:19, 169:9 States [4] - 4:2, 55:1, 66:15, 171:11 stating [1] - 83:20 stay [1] - 163:6 stem [2] - 66:21, 66:24 stems [1] - 123:17 steps [2] - 26:19, 44:2 still [12] - 10:2, 14:6, 15:8, 116:9, 116:20, 124:16, 128:25, 140:13, 141:14, 141:17, 142:12, 161:19 stipulation [2] - 11:18, 13:20 stream [27] - 49:13, 57:5, 59:7, 59:21, 60:2, 62:6, 62:8, 62:13, 62:23, 63:3, 67:23, 73:14, 75:3, 75:18, 78:23, 81:9, 82:8, 106:19, 112:20, 123:21, 144:7, 152:9, 152:15, 158:2, 162:22, 165:13 stream's [1] - 57:6 streamlined [1] - 49:18 streams [19] - 22:11,</p>	<p>22:12, 22:15, 27:20, 32:13, 33:2, 41:22, 51:19, 51:22, 51:23, 52:20, 56:24, 61:10, 91:6, 108:2, 156:17, 164:18, 164:21, 172:9 strengthen [1] - 171:19 stresses [1] - 28:5 stretches [1] - 156:21 stringent [10] - 29:6, 32:5, 35:11, 42:10, 58:4, 59:11, 67:7, 126:13, 126:14, 150:12 strive [1] - 144:16 strong [1] - 174:21 strongly [1] - 68:8 structure [4] - 115:19, 128:22, 129:1, 129:11 structured [1] - 168:15 stuck [2] - 44:17, 118:7 study [1] - 31:4 subcategories [1] - 28:13 subcategory [1] - 96:12 subject [8] - 7:7, 7:9, 128:18, 140:14, 141:18, 145:7, 145:9, 159:4 submission [3] - 82:19, 82:22, 130:13 submit [9] - 94:17, 117:11, 117:12, 131:6, 132:7, 132:9, 132:17, 132:24, 136:6 submits [2] - 124:20, 132:7 submitted [14] - 16:14, 16:20, 17:2, 46:13, 46:20, 53:4, 86:22, 104:2, 106:10, 135:11, 136:11, 137:14, 137:25, 138:7 submitting [1] - 123:5 Subparagraph [1] - 49:12 subsection [5] - 41:18, 42:5, 47:12, 48:2, 135:25 Subsection [27] - 41:22, 42:4, 49:7, 51:12, 51:17, 51:18, 51:24, 52:22, 99:18,</p>
--	---	--	--	---

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<p>121:24, 126:5, 131:7, 133:11, 134:7, 135:2, 135:15, 136:13, 136:19, 138:7, 138:12, 138:21, 140:21, 140:25, 143:9, 143:18, 144:25</p> <p>Subsections [1] - 51:1</p> <p>subsequent [3] - 21:1, 37:1, 46:23</p> <p>success [1] - 9:2</p> <p>sufficient [2] - 29:23, 76:14</p> <p>sufficiently [2] - 16:23, 145:19</p> <p>suggest [1] - 115:12</p> <p>suggested [4] - 49:10, 50:1, 68:9, 70:5</p> <p>suggesting [1] - 137:6</p> <p>suggestions [1] - 49:19</p> <p>Suite [2] - 2:12, 3:12</p> <p>sum [1] - 50:9</p> <p>summarize [6] - 23:15, 26:21, 48:19, 51:9, 56:1, 65:22</p> <p>summarizing [1] - 41:6</p> <p>summary [1] - 42:3</p> <p>Sumner [1] - 157:2</p> <p>Sun [1] - 37:6</p> <p>sunset [1] - 124:25</p> <p>supervise [1] - 71:21</p> <p>supplemental [5] - 12:3, 12:9, 12:10, 12:20</p> <p>supplies [1] - 20:7</p> <p>supply [1] - 28:18</p> <p>support [30] - 8:18, 9:4, 21:11, 21:24, 30:17, 30:24, 31:19, 33:22, 51:13, 58:19, 58:21, 60:17, 62:12, 62:22, 63:2, 63:19, 67:24, 71:4, 72:10, 90:5, 91:21, 93:6, 95:3, 152:7, 152:14, 153:17, 160:5, 161:20, 171:2, 174:2</p> <p>supportable [1] - 162:2</p> <p>supported [7] - 31:21, 32:5, 57:6, 62:14, 67:16, 70:7, 161:16</p> <p>supporting [7] - 69:25, 70:6, 70:21,</p>	<p>91:16, 95:1, 130:18, 161:8</p> <p>supportive [3] - 70:5, 160:7, 161:11</p> <p>supports [3] - 34:5, 57:15, 164:8</p> <p>supposed [1] - 91:18</p> <p>Sur [1] - 3:11</p> <p>Surface [14] - 19:4, 21:7, 22:21, 23:10, 24:1, 29:21, 39:10, 52:23, 53:21, 55:17, 63:16, 65:9, 65:10, 89:21</p> <p>SURFACE [1] - 1:6</p> <p>surface [15] - 19:23, 21:5, 24:14, 27:20, 27:25, 29:17, 29:24, 34:10, 39:14, 39:25, 40:5, 54:1, 76:6, 76:15, 90:1</p> <p>surplus [1] - 162:17</p> <p>surrounding [1] - 146:18</p> <p>survey [1] - 84:13</p> <p>Survey [1] - 66:16</p> <p>surveys [2] - 24:18, 84:11</p> <p>susceptible [1] - 16:8</p> <p>Sustainability [1] - 23:21</p> <p>swear [1] - 18:21</p> <p>swimmable [3] - 28:15, 106:22, 107:12</p> <p>swimming [23] - 34:16, 76:12, 80:23, 80:25, 81:3, 81:6, 81:12, 81:17, 81:19, 83:13, 83:18, 88:4, 88:7, 89:6, 89:11, 89:15, 89:17, 153:2, 159:13, 159:17, 159:20, 159:25, 160:3</p> <p>switch [1] - 144:1</p> <p>switching [2] - 138:19, 160:11</p> <p>sworn [13] - 8:8, 8:12, 23:2, 39:3, 53:12, 55:13, 55:14, 63:9, 65:19, 71:12, 170:22, 172:18, 177:7</p> <p>SWQB [2] - 79:9, 92:10</p> <p>System [4] - 25:9, 35:16, 43:14, 56:11</p> <p>system [2] - 165:10, 175:10</p>	<p style="text-align: center;">T</p> <p>table [3] - 148:18, 164:1, 164:9</p> <p>tables [1] - 162:21</p> <p>tackle [2] - 147:6, 147:8</p> <p>tackling [1] - 147:5</p> <p>tailored [1] - 133:24</p> <p>Taos [1] - 3:12</p> <p>targets [1] - 29:20</p> <p>tasks [2] - 24:21, 46:11</p> <p>TAYLOR [1] - 3:16</p> <p>tdolan@lanl.gov [1] - 4:11</p> <p>teacher [2] - 23:25, 25:2</p> <p>team [4] - 24:8, 24:16, 25:3, 71:24</p> <p>teams [1] - 63:24</p> <p>Tech [1] - 54:18</p> <p>technical [23] - 7:22, 7:23, 8:6, 12:19, 22:4, 25:17, 25:21, 26:3, 40:9, 53:1, 55:8, 55:10, 56:22, 62:2, 62:3, 65:2, 65:4, 70:12, 70:20, 70:24, 71:2, 72:2, 170:13</p> <p>technically [1] - 119:8</p> <p>technician [2] - 55:1, 174:5</p> <p>technicians [1] - 71:22</p> <p>technologically [2] - 123:15, 126:16</p> <p>Technology [1] - 23:23</p> <p>technology [2] - 123:23, 126:15</p> <p>temperature [5] - 30:4, 67:22, 68:7, 161:9, 161:11</p> <p>temperatures [2] - 67:22, 68:21</p> <p>temporal [1] - 134:8</p> <p>temporary [143] - 21:11, 22:9, 38:1, 41:15, 42:6, 42:7, 42:9, 42:13, 42:17, 42:23, 42:25, 43:1, 43:4, 43:7, 43:9, 43:25, 44:5, 44:6, 44:10, 44:13, 44:14, 44:24, 45:2, 45:11, 45:15, 45:16, 45:25, 46:3, 46:20, 46:25,</p>	<p>47:2, 47:6, 47:16, 47:18, 47:21, 47:24, 48:3, 48:7, 48:10, 48:17, 48:21, 48:22, 48:23, 49:1, 49:16, 50:9, 50:22, 95:18, 96:9, 97:19, 101:3, 101:7, 101:13, 101:25, 102:6, 102:7, 102:9, 102:13, 102:15, 102:22, 120:24, 121:3, 121:15, 121:22, 122:6, 123:6, 124:2, 124:20, 125:3, 125:6, 125:10, 125:21, 126:11, 126:20, 127:10, 127:14, 127:18, 127:19, 127:23, 127:25, 128:3, 129:25, 130:10, 130:13, 130:22, 131:3, 131:5, 131:12, 132:1, 132:3, 132:14, 132:16, 132:19, 132:20, 133:6, 133:10, 133:24, 135:7, 135:10, 135:12, 135:19, 135:24, 136:15, 136:17, 136:25, 137:1, 137:6, 137:13, 138:16, 138:22, 138:25, 139:3, 139:15, 139:17, 139:21, 140:5, 140:8, 140:13, 140:22, 141:1, 141:7, 141:15, 141:19, 141:24, 142:3, 142:14, 142:15, 142:20, 143:9, 143:11, 166:10, 167:17, 167:25, 168:3, 168:8, 169:10, 172:6, 174:7, 175:2</p> <p>Temporary [1] - 136:19</p> <p>tension [1] - 121:9</p> <p>tentatively [1] - 13:9</p> <p>term [11] - 42:15, 43:10, 43:24, 48:21, 96:9, 100:20, 102:6, 102:7, 102:12, 131:12, 169:10</p> <p>terms [7] - 13:4, 96:13, 124:9, 128:24, 167:5, 168:13, 168:15</p> <p>testified [7] - 23:3, 39:4, 53:13, 63:10,</p>	<p>71:13, 75:20, 90:11</p> <p>testify [2] - 14:18, 21:23</p> <p>testimonies [2] - 48:13, 65:16</p> <p>testimony [115] - 7:6, 7:7, 7:9, 7:23, 12:3, 12:9, 12:19, 12:20, 12:21, 13:25, 14:17, 15:22, 16:13, 16:14, 17:2, 17:5, 18:8, 21:11, 25:17, 25:21, 25:25, 26:3, 26:5, 26:6, 26:9, 31:10, 32:17, 33:15, 36:18, 38:3, 38:16, 38:17, 40:9, 40:12, 40:15, 40:23, 40:25, 41:3, 41:4, 41:11, 41:13, 42:1, 49:4, 51:15, 53:9, 55:8, 55:10, 55:13, 55:15, 55:17, 55:20, 55:22, 55:23, 56:2, 56:9, 56:14, 63:6, 65:2, 65:4, 65:7, 65:10, 65:14, 65:15, 65:19, 65:23, 66:22, 70:18, 71:8, 71:10, 72:3, 72:5, 72:8, 72:18, 73:18, 76:21, 77:5, 77:6, 78:9, 78:22, 79:6, 79:16, 81:11, 82:19, 82:25, 83:1, 83:2, 83:6, 91:25, 92:2, 92:7, 93:8, 95:22, 104:4, 105:24, 106:16, 106:17, 109:8, 109:10, 109:11, 109:12, 121:20, 121:25, 122:4, 128:19, 129:12, 129:24, 133:3, 133:18, 148:4, 166:18, 177:6, 177:8, 177:9</p> <p>text [1] - 136:18</p> <p>THE [5] - 1:2, 1:5, 2:2, 2:9, 2:15</p> <p>theory [1] - 13:7</p> <p>therefore [6] - 47:15, 67:8, 107:14, 108:18, 146:10, 153:8</p> <p>therein [1] - 68:21</p> <p>thermal [1] - 68:1</p> <p>thinking [1] - 169:9</p> <p>third [6] - 12:10, 15:22, 16:19, 22:4, 50:1, 66:5</p> <p>thoroughly [1] -</p>
--	---	---	---	--

KATHY TOWNSEND COURT REPORTERS

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(505) 243-5018 - Fax (505) 243-3606

<p>169:4 three [15] - 15:19, 19:13, 37:4, 39:12, 46:24, 66:1, 66:8, 83:9, 124:13, 124:18, 127:3, 162:23, 163:24, 163:25 three-month [1] - 162:23 three-year [2] - 124:13 thriving [1] - 161:13 throughout [6] - 8:4, 10:9, 24:18, 36:15, 52:25, 166:9 Thursday [3] - 14:7, 14:9, 14:19 tie [1] - 79:20 tier [1] - 141:25 Tier [3] - 142:3, 142:4 Tim [1] - 154:17 time-consuming [1] - 9:21 time-limited [2] - 44:14, 100:18 timeline [2] - 127:4, 131:10 timelines [1] - 46:12 timeliness [3] - 15:2, 15:10, 16:4 timely [1] - 13:8 timing [1] - 133:9 TIMOTHY [1] - 4:7 Title [1] - 19:7 TMDL [3] - 69:17, 166:24, 167:8 TMDLs [1] - 24:10 TO [1] - 1:5 today [22] - 11:25, 12:21, 21:3, 26:3, 26:5, 26:22, 40:15, 40:23, 41:1, 41:3, 41:11, 42:1, 66:1, 69:19, 72:6, 106:16, 106:18, 113:8, 158:22, 166:2, 166:11, 168:8 today's [1] - 19:1 together [3] - 6:2, 48:23, 136:11 tomorrow [4] - 14:20, 113:9, 170:2, 175:22 TONGATE [1] - 2:3 took [4] - 26:19, 107:19, 107:21, 114:9 tool [4] - 50:17, 96:20, 97:20, 167:12 toolbox [1] - 167:13</p>	<p>tools [5] - 35:19, 43:18, 44:1, 50:13, 168:14 top [2] - 89:16, 99:18 topic [4] - 73:14, 73:18, 94:8, 103:2 topics [1] - 129:6 total [4] - 24:5, 144:6, 150:9, 156:21 toward [3] - 97:14, 97:21, 99:18 towards [5] - 116:4, 122:24, 123:6, 139:23, 170:11 town [2] - 66:13, 67:6 Townsend [2] - 7:14, 177:4 toxicity [3] - 16:9, 146:23, 147:11 track [1] - 141:14 trade [1] - 37:16 traditionally [1] - 117:14 Trail [1] - 1:18 trained [1] - 9:1 transcribed [1] - 7:13 TRANSCRIPT [1] - 1:13 transcript [3] - 7:15, 177:7, 177:9 translate [1] - 166:22 translators [1] - 123:14 treat [1] - 126:15 treatment [9] - 35:8, 123:15, 131:21, 156:20, 156:25, 157:1, 157:2, 169:13 tribal [1] - 137:20 Tribal [1] - 8:17 Tribe [1] - 70:2 tried [1] - 148:16 Triennial [2] - 6:19, 19:2 triennial [42] - 11:14, 11:20, 12:14, 13:22, 19:12, 21:6, 22:1, 22:2, 22:12, 25:18, 26:10, 31:13, 32:9, 33:12, 33:14, 33:16, 35:23, 36:2, 36:15, 36:22, 44:8, 46:24, 53:5, 69:6, 73:24, 74:9, 74:23, 74:24, 75:16, 90:12, 91:4, 107:3, 107:15, 107:22, 108:13, 108:24, 109:1,</p>	<p>110:24, 111:12, 120:20, 127:8, 173:12 triggers [1] - 161:22 trip [1] - 84:18 trips [3] - 84:5, 84:9, 84:15 trout [1] - 9:25 true [5] - 96:18, 102:15, 102:18, 135:22, 177:9 trust [1] - 175:14 Trust [1] - 171:11 Truth [1] - 156:24 try [3] - 123:13, 147:6, 163:6 trying [7] - 8:23, 17:23, 116:10, 118:16, 163:22, 164:23, 168:12 Tuesday [1] - 69:10 Tularosa [4] - 56:15, 58:17, 62:17, 62:24 turn [13] - 6:11, 16:6, 35:21, 38:25, 51:7, 121:21, 129:23, 133:7, 148:4, 152:6, 154:23, 155:8, 169:25 turning [1] - 142:22 turns [1] - 14:19 two [10] - 56:4, 57:23, 59:8, 60:1, 60:14, 60:20, 64:11, 68:5, 149:4, 162:2 type [3] - 116:3, 162:19, 163:7 types [4] - 57:5, 57:17, 60:20, 131:22 typically [1] - 148:25</p>	<p>90:13, 90:16, 91:16, 91:20, 92:1, 92:17, 92:19, 108:20, 110:20, 112:17, 112:19, 160:11, 160:21, 160:25, 161:5, 161:7, 161:14, 161:24, 162:2, 168:6 UAA's [1] - 162:7 UAAs [24] - 32:11, 32:15, 33:22, 43:19, 44:7, 56:5, 57:17, 57:18, 57:24, 58:6, 58:7, 58:14, 58:25, 59:5, 59:8, 60:1, 61:25, 62:3, 62:6, 68:25, 71:6, 106:19, 108:24, 109:4 ultimate [1] - 42:21 ultimately [3] - 51:5, 61:18, 102:16 unable [2] - 94:21, 94:24 unattainable [1] - 33:21 unclassified [1] - 157:18 unclear [1] - 12:12 under [34] - 7:6, 19:9, 19:15, 19:25, 20:13, 30:14, 43:2, 46:21, 47:9, 47:19, 51:3, 51:11, 52:22, 53:6, 77:4, 79:11, 87:7, 89:20, 90:3, 97:24, 111:5, 111:10, 115:14, 117:2, 119:2, 121:11, 143:6, 144:22, 146:11, 146:19, 148:13, 164:16, 164:17, 165:4 underlying [10] - 42:19, 48:25, 97:15, 101:16, 101:18, 131:1, 133:25, 134:18, 141:16, 146:13 underprotects [1] - 57:21 understood [4] - 126:19, 132:22, 134:3, 148:24 unfortunate [1] - 160:24 unimpaired [1] - 173:21 unimproved [1] - 44:17 unintentionally [1] - 134:7</p>	<p>United [4] - 4:2, 55:1, 66:15, 171:11 University [7] - 23:19, 23:24, 39:22, 64:6, 64:7, 64:11, 64:15 unless [8] - 29:6, 29:16, 30:12, 31:24, 86:23, 102:2, 108:19, 153:10 unnatural [1] - 147:12 unquote [3] - 133:5, 133:6, 149:5 unreasonably [1] - 7:5 unsure [3] - 110:11, 111:3, 111:18 up [33] - 11:15, 13:2, 13:11, 14:5, 14:11, 14:25, 18:17, 18:19, 18:20, 38:21, 50:9, 51:25, 54:5, 72:25, 79:20, 93:3, 112:10, 115:19, 116:25, 117:3, 117:20, 122:14, 122:16, 154:22, 154:24, 155:6, 164:10, 170:1, 170:2, 170:12, 170:17, 174:22 update [3] - 22:9, 39:14, 127:5 updated [1] - 127:1 updates [2] - 22:3, 41:20 upgrade [6] - 34:1, 75:21, 87:2, 126:24, 152:8, 154:3 upgraded [2] - 75:9, 87:14 upgrades [3] - 22:10, 35:12, 75:19 upper [1] - 84:20 Upper [1] - 69:16 uppermost [1] - 68:12 upstream [1] - 86:20 urge [1] - 172:5 URL [1] - 110:1 US [8] - 145:12, 155:17, 156:8, 157:7, 157:11, 157:13, 157:14, 158:6 useful [4] - 59:24, 60:8, 61:11, 103:20 uses [124] - 9:15, 21:9, 22:10, 22:15, 26:13, 26:15, 27:16, 27:19, 27:20, 27:21,</p>
U				
		<p>UAA [73] - 30:13, 30:25, 31:3, 31:4, 31:9, 32:3, 32:25, 33:3, 36:18, 46:4, 48:24, 51:13, 51:14, 51:17, 51:22, 52:3, 52:6, 52:9, 52:12, 52:14, 52:20, 53:1, 56:5, 56:8, 56:13, 56:17, 57:15, 57:19, 58:16, 58:20, 59:12, 59:14, 60:3, 61:16, 61:19, 62:8, 62:14, 62:16, 62:20, 63:2, 65:12, 67:14, 68:5, 69:8, 69:11, 69:12, 69:23, 70:12, 70:20, 71:2, 74:19, 75:2,</p>		

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<p>28:2, 28:7, 28:12, 28:13, 28:17, 28:18, 28:20, 28:22, 28:23, 29:1, 29:4, 29:8, 29:16, 29:24, 30:2, 30:8, 30:11, 30:19, 30:20, 30:25, 31:9, 31:12, 31:15, 31:20, 31:21, 31:24, 31:25, 32:4, 32:5, 32:13, 32:24, 33:3, 33:7, 33:18, 33:23, 42:18, 42:20, 43:20, 44:7, 48:25, 50:15, 52:22, 56:19, 57:6, 57:8, 57:13, 57:16, 57:22, 59:23, 60:4, 60:9, 60:16, 60:18, 60:25, 61:4, 61:13, 61:15, 61:21, 62:4, 66:6, 67:12, 67:15, 67:18, 68:3, 68:6, 68:10, 74:14, 75:15, 86:25, 87:22, 89:22, 90:14, 91:7, 91:8, 92:4, 92:15, 94:13, 97:15, 101:2, 101:15, 101:16, 101:18, 106:22, 107:5, 107:9, 107:12, 107:23, 108:15, 108:18, 108:20, 110:20, 110:25, 111:2, 111:9, 111:11, 111:13, 112:15, 131:11, 146:1, 147:17, 152:19, 152:20, 152:23, 152:24, 152:25, 153:11, 153:16, 153:19, 154:4, 154:6, 161:8, 161:16, 164:23</p> <p>USGS [1] - 66:16</p> <p>Ute [1] - 70:2</p> <p>utility [1] - 174:10</p> <p>utilized [1] - 174:11</p> <p>utilizes [1] - 159:15</p>	<p>121:10, 121:11</p> <p>variances [5] - 95:24, 97:13, 99:8, 121:17, 134:13</p> <p>various [1] - 16:14</p> <p>vehicle [1] - 125:8</p> <p>verbal [2] - 41:11, 72:5</p> <p>Verheul [6] - 5:4, 5:6, 5:10, 5:12, 5:14, 10:13</p> <p>VERHEUL [26] - 2:16, 10:12, 11:8, 16:3, 18:16, 18:23, 22:20, 23:5, 38:18, 38:22, 38:24, 53:15, 63:12, 71:15, 72:17, 77:11, 77:13, 77:24, 78:2, 78:14, 78:16, 104:15, 113:4, 113:7, 113:18, 120:3</p> <p>version [1] - 70:12</p> <p>versus [1] - 121:10</p> <p>via [1] - 69:6</p> <p>viewable [1] - 7:16</p> <p>viewed [2] - 34:10, 121:6</p> <p>views [1] - 30:9</p> <p>VIGIL [1] - 2:6</p> <p>Vigil [1] - 15:6</p> <p>Virginia [5] - 15:23, 16:20, 17:4, 17:6, 17:13</p> <p>voir [1] - 17:21</p> <p>VOLLMER [4] - 5:2, 8:10, 8:11, 8:15</p> <p>Vollmer [1] - 8:9</p> <p>Volume [1] - 1:21</p>	<p>20:6, 20:7, 20:18, 20:21, 20:25, 21:10, 22:9, 24:10, 24:17, 26:11, 26:16, 26:18, 26:23, 27:1, 27:2, 27:4, 27:5, 27:7, 27:8, 27:11, 27:14, 27:17, 27:18, 27:19, 27:22, 27:23, 27:24, 28:7, 28:9, 28:18, 28:21, 28:23, 29:3, 29:5, 29:7, 29:8, 29:10, 29:11, 29:13, 29:17, 29:25, 30:3, 31:7, 31:22, 33:4, 33:5, 33:6, 33:9, 33:17, 34:7, 34:8, 34:10, 34:19, 35:19, 37:15, 39:9, 39:14, 39:25, 40:4, 40:5, 42:6, 42:10, 42:12, 42:21, 43:13, 43:23, 44:4, 44:15, 44:17, 44:21, 44:25, 45:3, 45:5, 45:11, 45:15, 45:19, 46:7, 46:17, 47:3, 47:13, 47:19, 47:25, 49:6, 50:23, 51:5, 51:11, 54:1, 54:19, 54:24, 55:4, 56:3, 56:9, 57:9, 57:10, 57:20, 57:23, 59:18, 60:13, 61:5, 61:22, 62:16, 63:21, 64:18, 65:24, 66:19, 66:25, 67:17, 67:18, 67:24, 68:6, 68:7, 68:11, 68:18, 68:20, 75:14, 76:6, 76:10, 76:11, 76:12, 76:13, 76:17, 81:1, 81:2, 81:4, 81:7, 81:20, 88:10, 88:16, 88:18, 88:21, 89:2, 89:14, 89:16, 89:19, 90:1, 93:19, 93:23, 95:23, 96:13, 96:16, 96:19, 96:22, 96:23, 97:5, 97:13, 97:16, 97:21, 98:1, 99:8, 99:16, 100:17, 100:19, 100:21, 100:23, 102:1, 102:20, 102:21, 102:23, 107:24, 108:19, 112:14, 116:8, 119:7, 121:7, 121:8, 123:20, 126:13, 126:14, 127:13, 127:15, 127:17, 127:22, 128:4, 129:17,</p>	<p>130:12, 130:24, 131:1, 132:19, 134:12, 137:2, 138:2, 139:11, 139:18, 140:10, 140:16, 141:13, 142:3, 142:5, 145:7, 145:11, 145:12, 145:13, 146:17, 146:25, 147:19, 149:1, 149:6, 150:6, 150:8, 151:23, 151:25, 155:15, 156:3, 157:13, 158:6, 158:7, 159:1, 159:10, 159:13, 159:17, 161:9, 162:1, 162:17, 162:21, 164:1, 164:6, 164:8, 164:24, 167:8, 169:2, 171:20, 172:25, 173:7, 173:8, 173:9, 173:18, 174:10, 174:17, 175:5, 175:9, 175:15</p> <p>WATER [2] - 1:2, 2:2</p> <p>Water [89] - 1:16, 3:14, 6:4, 6:19, 6:25, 10:16, 19:3, 19:11, 19:15, 19:18, 19:25, 20:14, 21:7, 22:21, 23:10, 24:1, 24:19, 25:10, 26:25, 27:3, 27:9, 27:11, 28:24, 30:7, 30:16, 31:18, 39:10, 39:15, 40:2, 43:2, 44:19, 45:4, 46:21, 47:9, 47:17, 47:19, 48:16, 49:10, 49:20, 50:2, 50:12, 51:3, 52:23, 53:6, 53:21, 55:17, 59:15, 60:17, 63:16, 65:9, 65:10, 70:2, 70:3, 70:4, 70:8, 73:6, 85:24, 86:8, 87:12, 89:21, 89:25, 90:24, 91:4, 92:13, 103:10, 107:4, 116:11, 117:6, 142:24, 144:8, 145:6, 145:7, 145:9, 145:16, 145:20, 146:1, 148:1, 149:7, 152:19, 152:23, 153:5, 153:15, 156:4, 156:5, 171:1, 171:4</p> <p>water-based [5] - 34:8, 34:19, 81:7, 81:20, 89:14</p> <p>water-quality-based [3] - 43:13, 43:23, 50:23</p>	<p>watering [1] - 28:19</p> <p>waters [74] - 21:5, 24:14, 27:21, 27:25, 28:1, 29:21, 30:12, 31:15, 32:21, 32:23, 33:7, 33:19, 35:9, 49:2, 51:13, 56:14, 56:20, 56:23, 57:2, 57:11, 58:16, 59:24, 60:9, 60:11, 60:14, 60:19, 60:24, 61:6, 61:12, 62:5, 76:15, 90:8, 90:13, 90:19, 93:21, 93:24, 94:3, 106:20, 106:23, 107:5, 111:1, 111:10, 112:16, 144:6, 144:20, 144:22, 145:1, 145:17, 145:20, 146:2, 146:6, 146:9, 146:15, 146:21, 147:17, 148:7, 151:18, 152:20, 155:16, 156:8, 157:7, 157:10, 157:11, 157:12, 157:14, 157:17, 157:23, 158:2, 158:5, 158:11, 161:10, 174:15</p> <p>WATERS [6] - 1:7, 2:6, 156:17, 156:23, 157:3, 176:1</p> <p>Waters [2] - 19:4, 156:16</p> <p>Watershed [2] - 69:25, 70:1</p> <p>watershed [4] - 24:9, 37:14, 44:22, 50:24</p> <p>ways [1] - 123:19</p> <p>weak [1] - 172:7</p> <p>weakened [2] - 171:20, 174:1</p> <p>weakening [2] - 174:14, 175:11</p> <p>weakens [1] - 172:1</p> <p>weaker [6] - 139:6, 139:9, 140:3, 172:8, 173:23, 174:7</p> <p>web [1] - 83:16</p> <p>web-based [1] - 83:16</p> <p>website [8] - 34:11, 36:14, 37:9, 37:19, 58:12, 68:25, 83:12, 84:23</p> <p>Wednesday [1] - 13:10</p> <p>week [4] - 10:9, 11:10, 23:11, 96:6</p>
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<p>weigh ^[1] - 117:21 weight ^[1] - 20:5 welfare ^[3] - 20:2, 27:2, 27:8 west ^[3] - 66:21, 67:3, 67:5 West ^[8] - 15:23, 16:20, 17:4, 17:6, 17:13, 66:12, 66:23, 67:9 Western ^[2] - 3:11, 10:18 wet ^[1] - 119:13 wetlands ^[2] - 175:6, 175:9 whichever ^[1] - 150:11 whole ^[1] - 173:2 wilderness ^[1] - 68:12 wilderness-bound ^[1] - 68:12 wildlife ^[3] - 20:7, 27:13, 28:19 withdraw ^[1] - 78:2 withdrawal ^[3] - 12:1, 12:6, 14:24 withdrawing ^[2] - 11:10, 13:24 withdrawn ^[2] - 11:12, 11:22 witness ^[11] - 7:12, 17:17, 17:19, 17:21, 22:18, 38:19, 39:1, 99:1, 115:3, 119:24, 120:3 witnessed ^[3] - 81:18, 83:17, 83:21 witnesses ^[11] - 18:17, 18:19, 21:20, 38:21, 72:23, 120:13, 170:7, 170:15, 175:23, 177:6, 177:10 wonder ^[1] - 113:10 word ^[3] - 129:3, 134:6, 134:21 words ^[4] - 47:5, 107:11, 152:24, 158:2 works ^[2] - 51:4, 126:20 WQCC ^[5] - 1:3, 6:7, 6:23, 9:3, 103:12 WQCC's ^[1] - 6:25 wrapping ^[1] - 170:12 write ^[1] - 94:15 written ^[14] - 12:1, 12:6, 25:21, 33:15, 46:22, 50:1, 55:8, 55:10, 56:9, 65:2,</p>	<p>65:4, 70:18, 72:2, 78:8</p> <p style="text-align: center;">Y</p> <p>year ^[8] - 24:6, 24:24, 84:12, 84:13, 124:13, 164:16, 175:7 years ^[19] - 9:2, 19:13, 24:4, 39:13, 39:24, 46:24, 64:12, 64:17, 118:21, 122:19, 122:20, 123:22, 123:23, 124:18, 124:25, 125:10, 127:3, 166:15 yesterday ^[1] - 104:2 yourself ^[5] - 25:24, 39:7, 53:16, 63:13, 71:16</p> <p style="text-align: center;">Z</p> <p>zebra ^[1] - 71:25 zone ^[1] - 68:19</p>
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